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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

JOSEPH J. LOCRICCHIO AND GARY FRANCELL,
Petitioners,

-vs.-

THE EVENING NEWS ASSOCIATION, INC.,
MICHAEL F. WENDLAND AND JEAN GADOMSKI,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

- AND APPENDIX -

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QUESTIONS PRESENTED

I.

WHETHER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRE A STATE APPELLATE COURT TO CONDUCT AN INDEPENDENT APPELLATE REVIEW OF THE EVIDENCE OF FALSITY IN A PRIVATE-FIGURE LIBEL ACTION AGAINST A MEDIA DEFENDANT AND ALLEGED TO INVOLVE MATTERS OF PUBLIC CONCERN.

II.

WHETHER A STATE SUPREME COURT'S DETERMINATION THAT ALLEGEDLY LIBELOUS SPEECH IS RHETORICAL HYPERBOLE PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, SO AS TO DEPRIVE PRIVATE-FIGURE LIBEL CLAIMANTS OF A BASIS FOR RECOVERY, REQUIRES INDEPENDENT APPELLATE REVIEW BY THIS COURT.

LIST OF PARTIES

The parties to the proceeding below were the petitioners Joseph J. Locricchio and Gary Francell and the respondents The Evening News Association, Inc., Michael F. Wendland and Jean Gadomski. Additional defendants Pete Waldmeir and Bill Giles were defendants through trial, at which time a motion for directed verdict was entered in their favor; accordingly, they are not named as parties herein.

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Schauer, "The Role of the People in First Amendment Theory," 74 Cal. L. Rev. 761 (1986) 22

Schnapper, "Judges Against Juries — Appellate Review of Federal Civil Jury Verdicts," 1989 Wisconsin L. Rev 237 21

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JOSEPH J. LOCRICCHIO AND GARY FRANCELL,
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THE EVENING NEWS ASSOCIATION, INC.,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

Petitioners, Joseph J. Locricchio and Gary Francell, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Michigan entered in this proceeding on August 26, 1991.

OPINIONS BELOW

The memorandum opinion of the Circuit Court for the County of Wayne, Michigan, Michael J. Connor, Circuit Judge, granting defendants' motion for directed verdict is unreported, and is reprinted in the appendix hereto, p. A-88, *infra*. The *per curiam* opinion of the Court of Appeals of Michigan, First District, reversing the decision of the Circuit Court for the County of Wayne and reinstating the jury's verdict, is unreported, and is reprinted in the appendix, p. A-112, *infra*; the Court of Appeals' interlocutory opinion affirming the denial of defendants' motion for summary judgment is unreported, and is reprinted in the appendix, p. A-80, *infra*. The opinion of the Supreme Court of Michigan, reversing the decision of the Michigan Court of Appeals,

is reported at 438 Mich. 84; 476 N.W.2d 112, and is reprinted in the appendix, p. A-1, *infra*.

JURISDICTION

The judgment of the Supreme Court of Michigan was entered on August 26, 1991. A timely motion for rehearing was filed on September 12, 1991, and was denied by Order dated October 17, 1991. This petition for certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

United States Constitution, Amendment VII:

> In Suits at common law, . . . no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

United States Constitution, Amendment XIV, § 1:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

INTRODUCTION – SUMMARY OF ARGUMENT

In this case, the Michigan Supreme Court, relying on this Court's decision in *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767 (1986), held that the First Amendment requires an appellate court reviewing a jury verdict in a private-figure libel action against a media defendant to conduct an independent examination of the record to determine whether the plaintiff carried his burden of proving falsity.

The effect of the Michigan Supreme Court's independent review standard will be to give media defendants a second chance to convince an independent fact-finder as to this crucial element of a libel claim, and will authorize appellate courts to ignore the factual determinations of juries and reach their own verdicts. Such a standard will effectively insulate the media from the liability determinations of the communities they serve, and will significantly erode the finality of jury determinations in public-interest libel actions, without serving any legitimate constitutional purpose.

This Court should grant certiorari to settle the important constitutional questions raised by the Supreme Court of Michigan's novel application of this Court's independent appellate review doctrine.

STATEMENT OF THE CASE

I.

JOSEPH J. LOCRICCHIO, GARY FRANCELL AND PINE KNOB

In 1964, petitioners Joseph J. Locricchio and Gary Francell formed Indusco Corporation for the purpose of developing commercial properties in Southeastern Michigan; by 1969, the partners had successfully com-

two industrial parks located in the suburban Detroit area of Oakland County (App., pp. A-153–A-159). During that period, a friend took Locricchio to look at a 400-acre parcel of land in a rural area near the city of Clarkston, Michigan; the land bordered on a 14-acre parcel containing a ski hill and chair lift. Locricchio fell in love with the site (App., p. A-159).

The partners purchased both parcels and developed an entertainment complex which included 1,000 condominium units, a ski resort, an outdoor summer music theatre, a championship golf course, restaurants and other properties (App., p. A-165). By 1976, the complex, known as Pine Knob, was the number one facility of its kind in the world.

II.

THE *DETROIT NEWS*' "INVESTIGATION" OF PINE KNOB

The Detroit News, published by respondent The Evening News Association, Inc., is Michigan's largest newspaper, and enjoys a statewide circulation. In 1979, the *News* assigned a recently-formed "investigative team," consisting of respondents Michael Wendland and Jean Gadomski, to investigate "rumors of organized crime involvement at Pine Knob." The "investigation" consisted of a review of court and land records and materials in the *News*' own library (App., p. A-140). Wendland and Gadomski also interviewed Locricchio and Francell at the hotel at Detroit Metropolitan Airport[1] (App., p. A-143). At the April 10, 1979, interview,

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[1] **By agreement with petitioners' attorney, Ted Tetzlaff, the interview was to be tape recorded in duplicate; however, the "duplicate" tapes provided by the *News* to Tetzlaff at the close of the interview were *blank* (App., pp. A-150–A-151). The undisputed trial evidence established that a "transcript" of the tapes, prepared by Gadomski and used to write the resulting articles, contained significant omissions and inaccuracies and was not a reliable record of petitioners' statements (App., pp. A-145–A-150; A-171–A-184).**

Wendland told the partners that the *News*' investigation had failed to uncover any organized crime involvement at Pine Knob, and that Wendland and Gadomski did not believe that they were members of the Mafia (App., pp. A-136–A-137).

III.

THE "PINE KNOB STORY" ARTICLES

The articles which form the basis of this lawsuit (App., pp. A-196–A-226) appeared on the front page of *The Detroit News* during the four-day period of Sunday, April 22, through Wednesday, April 25, 1979. The series, entitled "The Pine Knob Story," was presented as investigative journalism. A separate article appearing in *News* Editor Bill Giles' "News Notes" column on Sunday, April 22 (App., pp. A-196–A-198), described Wendland, the principal author of the series, as one of the reporters involved in investigating corruption and organized crime in Arizona following the murder of Arizona newsman Don Bolles. A box insert repeated in each installment encapsulated the theme of the four-part series:

> In the last eight years Pine Knob, in Oakland County, has developed from a losing ski resort to one of the nation's foremost entertainment complexes, worth millions. During these years the persistent question in Michigan and elsewhere has been "is it Mafia?" This is the first [second, etc.] of four articles resulting from [a] two-months' examination by The News of Pine Knob's finances and ownership.

Part One of "The Pine Knob Story" (App., pp. A-198–A-206) was headed "The Pine Knob story: How 2 friends and hustle created a big resort, millions in debt and a question: 'Is it Mafia'" Under an aerial photograph of

Pine Knob was a map of the area near Clarkston, Michigan, where Pine Knob is located, and the italicized insert paragraph with its tantalizing question, "Is it Mafia?" The words "Mafia," "mob," "organized crime," "Mafiosi," and "Sicilian heritage" were scattered throughout the first installment, a total of thirteen times. The article described the partners as "[p]ower brokers with the right connections — widely suspected to be Mafia," and stated that they "agreed to talk to The News . . . 'to clear the air'"[2] (App., p. A-198).

Part Two of "The Pine Knob Story" (App., pp. A-207–A-215) was entitled "The Pine Knob story: How loan got 'washed'." Immediately below this headline was a photograph of a Lincoln Continental with its trunk lid open; the photograph was captioned, "Harvey Leach's car was found with his body in the trunk." Beneath this headline and photograph was the series' recurrent insert with its insistent question, "Is it Mafia?"

The article purported to detail the partners' efforts to raise capital for Pine Knob through what the *News* characterized as a "money wash." Interwoven with this account were the details of the two totally unrelated murders of Agnes Brush and Harvey Leach, in a section containing the comment:

> Locricchio and Francell say they know nothing about either killing, and insist that it is coincidental that some of the same people were involved in the loans to Leach and

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[2] **In fact, Wendland's trial testimony established that the Pine Knob Story articles contained fabricated quotations that attributed untrue factual assertions to petitioners. For example, Wendland admitted that the statement "Even my mother sometimes has her doubts" regarding his alleged Mafia connections, although published as a verbatim quotation,was not an accurate report of Locricchio's remarks (App., p. A-139).**

> Pine Knob. A score of police agencies have investigated the murders and have not proved otherwise.

The third installment of "The Pine Knob Story" (App., pp. A-215–A-221) was entitled "The Pine Knob story: A brush with bankruptcy." Beneath the headline, an italicized insert contained the same paragraph published in Parts One and Two. Part Three described F.B.I. investigations of Locricchio and Francell in 1972 and 1975 and an unrelated 1975 F.B.I. investigation into suspected hidden ownership interests in the Aladdin Hotel and Casino in Las Vegas, Nevada. The details of these investigations were interwoven to suggest a continuous, related chain of events.

Part Four of the "Pine Knob Story" (App., pp. A-221–A-226) appeared under the headline "The Pine Knob story: Partners stalked by Mafia-hunters," and contained the same insert as the preceding three articles. The words "Mafia," "organized crime," "Sicilian family," and "Sicilian heritage" were sprinkled throughout the text of Part Four. The article stated:

> Locricchio's is an extremely large family and there are a considerable number of other Joseph Locricchios in the Detroit area, which has been known to confuse police and journalists.

These articles resist summarization. However, viewed in their entirety, the articles portrayed Locricchio and Francell as members or associates of the Mafia, linked them with two unsolved murders, and suggested that their development and operation of Pine Knob had involved them in a series of questionable and/or illegal financial transactions. The partners demanded a retraction. The newspaper refused.

IV.

PROCEDURAL HISTORY

A. Pre-Trial Proceedings

On April 3, 1980, petitioners instituted the present action in the Circuit Court for the County of Wayne, Michigan, alleging, *inter alia*, that "The Pine Knob Story" articles were libelous. After petitioners served interrogatory answers indicating that their libel claims were not necessarily based on a particular false statement, but on the inferences contained in the articles, respondents filed a motion for summary judgment. Respondents argued that petitioners could not maintain their libel claims because they had failed to demonstrate that any particular sentence in the articles was "factually false." The court denied this motion, holding that factual falsity may pertain to implications as well as to direct statements.

Respondents initiated an interlocutory appeal from this order in the Court of Appeals of Michigan. In a unanimous, unpublished *per curiam* opinion dated August 24, 1983 (App., pp. A-80–A-83), the Court of Appeals affirmed the trial court's ruling, holding that insinuation, imputation or inference may be as defamatory as a direct, unveiled assertion, and that petitioners' pleadings gave rise to an issue of fact which must be left to the trier of fact.[3]

B. Trial And Verdict

The jury trial of this matter commenced on July 10, 1985, before Wayne County Circuit Court Judge Michael

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[3] **Respondents subsequently filed a motion for rehearing in the Court of Appeals, an application for leave to appeal and a motion for rehearing in the Supreme Court of Michigan, and a petition for certiorari in this Court, all of which were denied.**

J. Connor, and continued for eight weeks. At trial, respondent Michael Wendland testified that, during the *News*' investigation, "we did not find any organized crime involvement in the ownership of Pine Knob, nor did we think that [Locricchio and Francell] were members of the Mafia" (App., p. A-137). Wendland admitted that at the time that the articles were published, he had concluded that the partners were not members of the Mafia (App., p. A-138).

Wendland also testified that he had investigated the Leach murder for the *News* in 1974, and had written a series of articles detailing the results of his investigation; he admitted that he had never encountered the partners' names during his investigation and did not believe that they were ever suspects in that case (App., p. A-128). He testified that he knew in 1974 that Locricchio and Francell were not suspects in the Brush murder, and that, at the time of the publication of "The Pine Knob Story" articles, he did not believe that they were ever suspects in either murder (App., pp. A-128–A-129). Respondent Jean Gadomski's testimony was consistent with that of Wendland (App., pp. A-142–A-143).

Both Locricchio and Francell testified that they were not members of the Mafia and had never been members of organized crime (App., pp. A-169; A-184). Locricchio also testified that rumors of Mafia involvement at Pine Knob began with the publication of an article by *News* columnist Pete Waldmeir in 1972 (App., pp. A-174–A-176).

After respondents' motion for a directed verdict was taken under advisement, the jury was instructed that petitioners bore the burden of proving that respondents published materially false statements concerning petitioners to third persons, that those statements had a tendency to harm petitioners' reputations, and that respondents acted with actual

malice[4] (App., pp. A-189–A-190). The jury was specifically instructed that petitioners could not satisfy their burden of proving material falsity if the articles were substantially true, and that "[s]light inaccuracies which do not alter the complexion of the matters reported, do not constitute material falsity" (App., pp. A-188).

On September 4, 1985, the jury returned a verdict in favor of petitioner Gary Francell and awarded him $3 million in compensatory damages, finding publication, material falsity, harm to reputation and actual malice.[5] The jury found no publication as to the claims of petitioner Joseph Locricchio.

C. Post-Trial Proceedings in the Trial Court

On December 11, 1986, Judge Connor issued his written opinion directing a verdict in favor of respondents, holding that "liability [for libel] cannot be

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[4] The trial court ruled that petitioners were not public figures, but that the articles concerned matters of public interest. At that time, Michigan's public-interest qualified privilege required the plaintiff in a public-interest libel case to prove actual malice. This rule was abrogated in 1986, in *Rouch* v. *Enquirer & News*, 427 Mich. 157; 298 N.W.2d 245, and a negligence standard was substituted.

[5] The jury completed a separate verdict form, containing ten interrogatories, for each plaintiff (App., pp. A-192–A-195). The jury answered the first four questions on Francell's verdict form as follows:

1. Did the defendants make the statement of fact complained of to a third person by printing, writing and/or pictures? YES.
2. Was the statement false in some material respect and did the statement have a tendency to harm the plaintiff's reputation? YES.
3. Was the statement of and concerning the plaintiff? YES.
4. Did the defendants have knowledge that the statement was false or did defendants act with reckless disregard as to whether the statement was false? YES.

imposed for journalistic inferences allegedly arising from the reporting of true facts about matters of public interest and concern" (App., p. A-89). The opinion enumerated Judge Connor's findings of fact as to what he believed petitioners had not proven to be false at trial (App., pp. A-108–A-110).

D. Proceedings in the Court of Appeals of Michigan

Petitioners timely filed their claim of appeal in the Court of Appeals of Michigan. On February 24, 1989, the court issued its unanimous, unpublished *per curiam* opinion, reversing Judge Connor's decision and reinstating the jury's verdicts (App., pp. A-112–A-120). The court grounded its decision upon the doctrine of the law of the case, noting that it had rejected respondents' arguments regarding the viability of an action for libel by implication in its interlocutory opinion in this case, and stating that "we do not believe that the United States Supreme Court's decision in *Philadelphia Newspapers, Inc* v. *Hepps* . . . bars a suit for defamation by implication" (App., p. A-119).[6] Defendants' motion for rehearing was denied.

E. Proceedings in the Supreme Court of Michigan

Respondents' application for leave to appeal was granted by the Supreme Court of Michigan. Thereafter, on August 26, 1991, the Supreme Court, in a divided opinion, reversed the ruling of the Court of Appeals and nullified the jury's verdict.

The four-justice majority held that in a private-figure, public-interest libel action involving a media defendant,

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[6] **Respondents had argued that this Court's use of the term "the statement at issue" in *Hepps* requires a plaintiff to prove a false *statement*, as opposed to an inference of implication, in order to recover for libel.**

a reviewing court has a constitutional duty to conduct an independent examination of the record to determine whether the plaintiff has carried his burden of proving falsity (App., pp. A-22–A-26). The court based its holding upon this Court's decision in *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767 (1986), stating that "the Court in *Hepps* created an issue of constitutional fact regarding whether a plaintiff carries the burden of proving falsity" and that independent appellate review of the issue of falsity in public-interest cases is "a logical corollary to independent review of actual malice" (App., p. A-26).

The majority then proceeded to review the record as to both defamatory meaning and falsity, concluding that "the record does not reveal that the plaintiffs proved any material falsity by even a preponderance of the evidence" (App., p. A-36). While agreeing that the implications contained in the articles could support an action for libel,[7] the court found that petitioners had failed to prove the falsity of the central implication of the articles — that petitioners were members or associates of organized crime (App., pp. A-43–A-44). The court discarded without comment the standard of review applicable to directed verdicts under Michigan law, which requires the court to view the evidence in the light most favorable to the non-movant,[8] substituting a standard in which the reviewing court *reweighs the evidence* to determine whether the record contains the necessary *quantum* of proof of falsity (App., pp. A-26–A-27).

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[7] **The court stated that "we do not, and need not, disagree in theory with the conclusion . . . that a cause of action for libel by implication might succeed without a direct showing of false statements" (App., p. A-36, n. 32).**

[8] ***Caldwell* v. *Fox*, 394 Mich. 401, 407; 231 N.W.2d 46 (1975).**

Having thus defined the scope of its self-imposed mission of independent review, the majority felt free to disregard petitioners' trial testimony respecting the falsity of the articles, which is not even referred to in the court's factual summary (App., pp. A-13–A-18). In addition, although conceding that the evidence showed that the statements contained in the headlines "Partners stalked by Mafia-hunters" and "Mafia-hunters stalk Locricchio, Francell" were false, the majority dismissed these statements as "rhetorical hyperbole" protected by the First Amendment (App., p. A-45). The majority then disposed of the "troubling" photograph of Harvey Leach's car and its grossly misleading headline with the statement, "the articles must be construed as a whole, and the article later pointed out that intensive investigations by law enforcement agencies failed to link the plaintiffs to the Leach (or Brush) murders" (App., p. A-45).

In a lengthy opinion concurring in the result only,[9] Chief Justice Cavanagh rejected the majority's holding that the factual issue of falsity is subject to independent appellate review as a question of "constitutional fact," pointing out that the majority's analysis "blurs the distinction between the defamation plaintiffs' acknowledged constitutional *burden* of proving falsity, and the nature of the issue of falsity itself" (App., p. A-48, Cavanagh, C.J., concurring; emphasis in original).

Justice Cavanagh noted that the fact that constitutional principles require a party to bear the burden of proof at trial does not itself give rise to a requirement of independent appellate review, citing the constitutional requirement in criminal cases of proof beyond

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[9] **The concurrence concluded "that a defamation defendant cannot be held liable for the reader's possible inferences, speculations, or conclusions, where the defendant has not made or directly implied any provably false factual assertion" (App., p. A-57, Cavanagh, C.J., concurring).**

a reasonable doubt, which has never been thought to require appellate courts to independently review the underlying factual issue of guilt (App., pp. A-48–A-49). He then concluded that the majority erred in analogizing the issue of falsity to that of actual malice, since actual malice is a mixed question of fact and law, while falsity "would appear to be a classic issue of pure historical fact" (App., p. A-49). Justice Cavanagh appeared troubled by the fact that the majority's independent review of falsity, "to have any real meaning, . . . would necessarily have to apply even to credibility issues, a province traditionally reserved most jealously for the jury as trier of fact" (App., p. A-50, n. 2).

Justice Levin dissented "because there was sufficient evidence for submission to the jury that the Detroit News falsely implied that Locricchio and Francell were members or associates of organized crime" (App., p. A-59, Levin, J., dissenting).

Petitioners' motion for rehearing was summarily denied by Order dated October 17, 1991.

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REASONS FOR GRANTING THE WRIT

I.

THE FIRST AMENDMENT DOES NOT MANDATE INDEPENDENT APPELLATE REVIEW OF THE PURELY FACTUAL ISSUE OF FALSITY IN A PUBLIC-INTEREST LIBEL ACTION.

Although the First Amendment's guarantees of freedom of expression are stated in unconditional language, there are categories of communications to which those guarantees do not extend, because they form "'no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 504 (1984). Libelous speech has been held to be one such category. *Id.* Yet, because of the tension that necessarily exists between freedom of expression and the important state interest in redressing wrongful injury to reputation, this Court has extended a measure of "strategic protection" to defamatory utterances. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

In *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), this Court held that the First Amendment prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice." In so doing, this Court also imposed upon itself a duty, "in proper cases," to conduct an independent examination of the whole record to ensure that the judgment does not constitute "a forbidden intrusion upon the field of free expression." *Id.* at 285.

A. Independent Appellate Review Is Applicable To Issues Of Constitutional Law, Not Fact.

The term "independent appellate review" refers to the Court's duty to independently evaluate the record to determine whether a constitutional rule was properly applied in the lower courts. *See Bose Corp.* v. *Consumers Union of United States, Inc.*, *supra* at 499-501; *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 688-689 (1989). However, not every case which involves the application of a constitutionally-required legal standard mandates independent appellate review: It comes into play only in marginal cases, where the court is required to determine the *scope* of the constitutional formula at issue, because the particular facts present a question as to whether the defendant's conduct falls within the outer limits of the rule. *Bose Corp.* v. *Consumers Union of United States, Inc.*, *supra* at 503, n. 21.

The concept of independent appellate review has been regularly applied by this Court to cases in which the states have sought to impose liability on the basis of particular forms of expression. *See Hess* v. *Indiana*, 414 U.S. 105, 108-109 (1973) (incitement to riot); *Kois* v. *Wisconsin*, 408 U.S. 229 (1972) (obscenity); *Street* v. *New York*, 394 U.S. 576 (1969) ("fighting words"); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946) (contempt of court). In libel actions, independent appellate review has been applied to the issue of whether the defendant's statement was capable of bearing a defamatory meaning, *Milkovich* v. *Lorain Journal Co.*, 497 U.S. ___; 111 L. Ed. 2d 1 (1990); *Letter Carriers* v. *Austin*, 418 U.S. 264 (1974); *Greenbelt Cooperative Publishing Assn., Inc.* v. *Bresler*, 398 U.S. 6 (1970); and whether the plaintiff presented constitutionally-sufficient evidence of actual malice at trial, *Harte-Hanks Communications, Inc.* v. *Connaughton*, *supra*; *New York Times Co.* v. *Sullivan*,

supra.[10] The common thread running through these cases is that each involves the application of a definition deemed to be constitutionally mandated, thus fixing the category of unprotected speech within substantive constitutional limitations which create an issue of "constitutional fact." *Jenkins* v. *Georgia*, 418 U.S 153, 160 (1974). The question of law invoking the duty of independent appellate review is whether these constitutionally fixed perimeters have been breached.

The "falsity" of an allegedly libelous statement is not such an issue, because this Court has fashioned no constitutional definition of falsity to which the doctrine of independent appellate review arguably might attach. On the contrary, in *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. __; 115 L. Ed. 2d 447, 472 (1991), this Court *declined* the defendants' invitation to create such a constitutional rule. Instead, *Masson* held that the common-law definition of falsity is applicable to such cases, and recognized that the falsity *vel non* of allegedly libelous statements is an issue of fact. *Id.* at 475.

Moreover, since publication by the media appears to create a presumption that the material is "of public concern," the duty of independent appellate review imposed by the Michigan Supreme Court in theory extends to *every* jury verdict in *every* libel action involving a media defendant. This Court has never endorsed such a policy. Indeed, in *Gertz* v. *Robert Welch, Inc.*, *supra* at 343, the Court stated that "this approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable." Accordingly, this Court found the formulation of broad rules of gen–

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[10] However, *see Bose Corp.* v. *Consumers Union of United States, Inc.*, *supra* at 517, n. 1 (Rehnquist, J., dissenting).

eral application preferable to an "ad hoc resolution of the competing interests at stake in each particular case." *Id.*

The rule stated in *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767 (1986) adequately protects the constitutional interests at stake without the unnecessary burden of independent appellate scrutiny of the jury's finding of falsity. Where a properly instructed jury, placing the burden of proving falsity upon the plaintiff (and thus resolving any doubts in the defendant's favor), has found the defendant's statements to be false, any constitutionally-inspired solicitude for the defendant's speech should vanish, since there is no constitutional value in false statements of fact, and the public interest is not served by the dissemination of false and defamatory information. *See e.g. Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984) ("False statements of fact harm both the subject of the falsehood *and* the readers of the statement").

B. In Mandating Independent Appellate Review Of The Issue Of Falsity, The Michigan Supreme Court Misinterpreted And Misapplied This Court's Decision In *Philadelphia Newspapers, Inc.* v. *Hepps*.

The Michigan Supreme Court has acknowledged that this Court's decisions in *New York Times*, *Bose* and *Connaughton* provide no direct support for its conclusion that independent appellate review of a jury's findings as to falsity is constitutionally required; nonetheless, the court held that this Court's decision in *Philadelphia Newspapers, Inc.* v. *Hepps*, *supra*, mandates this result. The court interprets *Hepps* as forming the springboard for a "logical extension" of the principle of independent appellate review to encompass appellate scrutiny of the factual determinations of a jury as to

the truth or falsity of the defendant's statements. This reading of *Hepps* reveals a fundamental misunderstanding of that decision as it relates to libel by implication.

In *Hepps*, a majority of this Court concluded that the First Amendment requires a rule that the plaintiff bear the burden of proving falsity in a libel action against a media defendant, where defendant's publication involves a matter of "public concern." However, nothing in *Hepps* suggests that, in imposing this rule, this Court intended to trigger independent appellate review of the jury's factual determination of truth or falsity. Indeed, in *Milkovich* v. *Lorain Journal Co.*, *supra*, this Court recently elucidated the application of the rule stated in *Hepps* to actions involving libel by implication, and concluded that the *legal* question arising in this context is whether defendant's statements imply an assertion of objective fact that is *capable of being proven true or false — not* whether falsity was proven to the appellate court's satisfaction.

In *Milkovich*, this Court repudiated the so-called *Gertz* "opinion privilege," noting that an expression of opinion frequently implies the assertion of an objective fact. The Court held that freedom of expression is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between "opinion" and fact, explaining, "[W]e think Hepps stands for the proposition that a statement on matters of public concern must be *provable as false* before there can be liability under state defamation law, at least . . . where a media defendant is involved." *Id.* at 18 (emphasis added).

Hepps ensures full constitutional protection for statements having no provably false factual connotations, while leaving unprotected statements which imply false

and defamatory facts. Thus in actions alleging libel by implication, the dispositive legal question is whether a reasonable fact-finder could conclude that the defendant's statement implied a defamatory factual assertion; if so, the issue of falsity is for the jury. *Id.* at 19.

C. The Right To Trial By Jury Prohibits Appellate Inquiry Into A Jury's Factual Determinations.

The Seventh Amendment provides that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." This Court has held that the Seventh Amendment is not binding upon the states.[11] *Walker* v. *Sauvinet*, 92 U.S. 90, 92-93 (1876). Happily, however, constitutional questions are always open. *Gideon* v. *Wainwright*, 372 U.S. 335, 346 (1963) (Douglas, J., concurring). This case, which pits the rights of the media to disseminate information against the rights of individual citizens harmed by the abuse of those rights, is a particularly appropriate vehicle for the reconsideration of this important constitutional question.

The Founders of our Nation considered the right to trial by jury in civil cases to be an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign or, for that matter, to that of the judiciary. *Parklane Hosiery Co., Inc.* v. *Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting). Those who favored juries believed that a jury would reach a result that a judge either could not or

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[11] **Regardless of the applicability of the provisions of the Seventh Amendment to this state-court proceeding, the analogous provisions of the Michigan Constitution forbid the Michigan Supreme Court to pass upon questions of fact. Mich. Const. 1963, Art. 1, § 14; *Peoples Wayne County Bank* v. *Wolverine Box Co.*, 250 Mich. 273, 278-280; 230 N.W. 170 (1930); *Whitson* v. *Whitely Poultry Co.*, 11 Mich. App. 598; 162 N.W.2d 102 (1968).**

would not reach.[12] *Id.* at 344. Thus because the "'[m]aintenance of the jury as a fact-finding body is of such importance . . . any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.'" *Dimick* v. *Schiedt*, 293 U.S. 474, 486 (1935).

Despite its central role in the formation of our government, this Court has held that the right to a jury trial in civil cases is not among the requirements of due process. *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937). However, in view of our heritage and the history of the adoption of the Constitution and the Bill of Rights, it seems peculiarly anomalous to maintain that trial by an independent jury selected from the common citizenry is not a fundamental right. *Reid* v. *Covert*, 354 U.S. 1, 9 (1956). Petitioners submit that the finality of a jury's factual determinations is a central element of the right to trial by jury, which remains one of the most effective barriers to arbitrary governmental action. *Id.* at 10. As such, it is one of those fundamental rights which the due process clause of the Fourteenth Amendment makes binding upon the states.

Yet petitioners do not rely solely upon the fundamental nature of this constitutional right; rather, petitioners would have this Court evaluate the decision of the Michigan Supreme Court in light of the competing

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[12] **This belief appears to have been well founded. A review of all 208 published opinions in which a federal appellate court resolved one or more challenges to the sufficiency of the evidence to support a jury verdict during the period between October, 1984 and October, 1985, revealed an overall reversal rate of 49.0%. Moreover, jury verdicts in favor of plaintiffs were reversed in 52.5% of the cases reviewed, while the reversal rate for defense verdicts was only 23%. Schnapper, "Judges Against Juries — Appellate Review of Federal Civil Jury Verdicts," 1989 Wisconsin L. Rev. 237, 246-247, 250. The author states that "*the likelihood that a jury verdict will be overturned on appeal depends to a substantial degree on the background of the judges who compose the particular panel that decides each case.*" *Id.* at 248 (emphasis added).**

considerations which guide this Court in determining the rights of libel plaintiffs against media defendants.

In extending the concept of independent appellate review to the issue of falsity, the Michigan Supreme Court eviscerates the role of the jury, in effect vesting appellate courts with original jurisdiction in libel cases involving media defendants. The court justifies its assumption of the role of super-jury and appellate fact-finder by noting that the doctrine of independent appellate review "reflects an inherent distrust of allocating unlimited decisional power to juries in the First Amendment context," and quotes one commentator as stating that "'much of contemporary first amendment doctrine . . . is devoted to protecting speech *from* the jury.'"[13]

In fact, however, libel cases against the media present a particularly strong argument in favor of the jury, both as fact-finder and as a procedural safeguard. The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 448 (1957). Trial by jury of libel actions thus provides a peculiarly competent application of the standard for judging libelous speech which, by its definition, calls for an appraisal of the material according to the understanding of the average reader. *Cf. Masson* v. *New Yorker Magazine, Inc.*, *supra* at 472 ("a statement is not considered false unless it 'would have a different effect on

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[13] (App., p. A-27, n. 20; emphasis in original), citing Schauer, "The Role of the People in First Amendment Theory," 74 Cal. L. Rev. 761, 765 (1986). However, Professor Schauer's article, far from supporting the court's conclusion, decries the view that the role of the jury should be diminished in such cases, noting that "[i]f a free speech right derived from the notion of popular control is used to deny that control, something very odd is happening," and asking, "What conception of freedom of speech and press would produce a system in which an informed public would not be allowed to decide just how much speech is wanted?" *Id.* at 781, 768.

the mind of the reader from that which the pleaded truth would have produced'").

Moreover, jurors, despite their brief public role as arbiters of the facts at trial, are virtually always relatively anonymous citizens; while judges, as public servants and public figures, are themselves particularly vulnerable to attacks by the press and broadcast media. Even more importantly, because jurors are chosen from the ranks of American citizens, the collective opinions of juries are more likely to express the consensus of American values upon which our common-law system is based than is the judgment of a judicial officer. Clearly, it is for these reasons that the controlling distinction between the power of the court and the power of the jury is that the former is the power to determine the law, and the latter to determine the facts. *Dimick* v. *Schiedt*, *supra* at 486. This Court has expressly recognized that this distinction is no less applicable to libel cases than to other classes of common-law claims.

In *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), this Court discussed the evidentiary standards applicable to the granting of motions for summary judgment and directed verdict, and held that the clear-and-convincing evidentiary standard applicable to the actual malice determination in public-figure libel actions must be applied at the summary judgment stage, as well as at trial. In imposing this burden, the Court stated:

> Our holding . . . does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a

motion for summary judgment or for a directed verdict.[14]

The sole function of the jury is to determine issues of fact, and we regularly entrust to juries the responsibility of decisions affecting the lives and liberty of American citizens, including decisions which directly implicate constitutional rights.[15] To suggest that jurors are incompetent to inquire into the falsity of a defendant's libelous statements, thus distinguishing this particular inquiry from the myriad of no less weighty issues entrusted to their judgment, is patently absurd. *See Dun & Bradstreet, Inc.* v. *Greenmoss Bldrs., Inc.*, 472 U.S. 749, 768, n. 2 (1985) (White, J., concurring). For this reason, as the decisions of this Court have consistently emphasized, the independent judgment exercised by appellate courts in First Amendment cases does not extend to such issues. *See Bose Corp.* v. *Consumers Union of United States, Inc.*, *supra* at 499-500; *Harte-Hanks Communications, Inc.* v. *Connaughton*, *supra* at 688; *Masson* v. *New Yorker Magazine, Inc.*, *supra* at 475.

The record in this case contains ample evidence to support the jury's findings of falsity and actual malice, including the admissions of the authors of the articles

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14 **The Michigan Supreme Court interprets *Anderson* as requiring a trial court passing upon a motion for directed verdict to weigh the evidence to determine whether the substantive evidentiary standard has been met (App., pp. A-27, n. 18). Such an undertaking is, however, expressly forbidden by *Anderson*, which reaffirms the applicability of the standard for directed verdict under Rule 50(a) of the Federal Rules of Civil Procedure. *Id.* at 250-251. Michigan applies the same standard. *Caldwell* v. *Fox*, 394 Mich. 401; 231 N.W.2d 46 (1975).**

15 **This is particularly true in the criminal context, where the due process clause of the Fourteenth Amendment protects a defendant in a criminal case against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970).**

that their pre-publication investigation had convinced them that there was no organized crime involvement in Pine Knob.[16] Under these circumstances, the Michigan Supreme Court usurped the jury's fact-finding function when it determined that its verdict in favor of petitioner Francell was "against the great weight of the evidence."

II.

THE DECISION OF THE MICHIGAN SUPREME COURT CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL AND STATE APPELLATE COURTS.

Other appellate courts have refused to endorse the extension of the doctrine of independent appellate review to issues not directly bearing upon constitutionally-mandated standards. In *Maheu* v. *Hughes Tool Co.*, 569 F.2d 459, 464 (9th Cir. 1977), the Ninth Circuit declined to conduct a *de novo* review of the evidence of falsity in a public-figure libel action, observing that the standard of review proposed by the defendant would "give [defendant] a second chance to convince an independent fact finder." Noting that "it is questionable whether the issue of truth rises to the level of a 'constitutional fact,'" the court concluded that it was at least arguable that defendant, by conceding the issue of actual malice, had removed any First Amendment issue from the case.[17] *Id.*, at 464-465.

Maheu is substantially indistinguishable from the present case. In addition, the highest courts of two states have refused to endorse the notion that independent appellate review applies where actual malice is not at

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16 *See* Statement of the Case, *supra* at p. 9.

17 In this case, the defendants did not formally concede the issue of actual malice; however, the testimony of the reporters amounted to a *virtual* concession of this issue.

issue. *See Lansdowne* v. *Beacon Journal Publishing Co.*, 512 N.E.2d 979; 32 Ohio St. 3d 176, 181 (1987) (independent appellate review inapplicable to finding of negligence); *Gazette, Inc.* v. *Harris*, 229 Va. 1, 20 (1985) (independent appellate review inapplicable to issue of compensatory damages). These decisions also conflict in principle with the Michigan Supreme Court's holding.

III.

INDEPENDENT APPELLATE REVIEW OF THE MICHIGAN SUPREME COURT'S DETERMINATIONS AS TO THE DEFAMATORY MEANING OF THE ARTICLES IS CONSTITUTIONALLY MANDATED.

The Michigan Supreme Court also found that "the headlines in the series, while arguably inflammatory, do not convey false implications apart from the context of the reported facts," and that "[w]hile the headline that the partners were 'stalked by Mafia-hunters' was somewhat misleading, since the 'Mafia-hunters' were not stalking the plaintiffs, the headlines falls into the category of permissible rhetorical hyperbole" (App., pp. A-44–A-45).

The court's holding appears to draw its authority from *Greenbelt Cooperative Publishing Assn., Inc.* v. *Bresler*, *supra*, in which this Court held that a public figure could not maintain a libel action based upon a newspaper's report that he had been accused of "blackmail" during a city counsel meeting, where, in the context of the article, "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [plaintiff's] negotiating position extremely unreasonable." *Id.* at 14. *See also Letter Carriers* v. *Austin*, *supra* at 284-286 (use of the word "traitor" in definition of union "scab" could not form basis of libel action where the epithet was "merely rhetorical hyperbole, a

lusty and imaginative expression of the contempt felt by union members").

In *Greenbelt*, this Court found that no reasonable reader could have failed to discern that the charge of "blackmail" was used in a purely figurative sense. In this case, however, the headlines "Partners stalked by Mafia-hunters" and "Mafia-hunters stalk Locricchio, Francell" appeared in a series of articles which implicitly promised to answer the question "is [Pine Knob] Mafia?" In this context, the headlines were not "rhetorical hyperbole" protected by the First Amendment.

This Court has repeatedly recognized that the existence of First Amendment-based limitations regarding the manner in which defamatory meaning may be conveyed mandates independent evaluation by the Court. *See Greenbelt Cooperative Publishing Assn., Inc.* v. *Bresler*, *supra* at 11; *Letter Carriers* v. *Austin*, *supra* at 282; *Milkovich* v. *Lorain Journal Co.*, *supra* at 19; *Masson* v. *New Yorker Magazine, Inc.*, *supra* at 475-478. When the highest court of a state has reached a conclusion on such an issue, its reasoning is deserving of attention, but its authority is not final. *Pennekamp* v. *Florida*, *supra* at 335. Rather, this Court must examine for itself the statements at issue and the circumstances under which they were made, to see whether they are of a character that those guarantees protect. *Id.*

CONCLUSION

Should the decision of the Supreme Court of Michigan stand, the right to a trial by jury in public-interest libel actions will be seriously eroded, both in Michigan and in those other jurisdictions which choose to follow Michigan's lead in requiring independent appellate review of this quintessentially factual issue. Moreover,

the judicial quagmire created by the court's decision will inevitably further protract the appellate process with respect to such cases, while yielding no countervailing benefit in increased predictability of results. Indeed, since the court has not seen fit to explicate the constitutional rule laid down in its decision, it has virtually ensured that the courts will be clogged with appellate briefs testing the meaning and effect of its pronouncements, absent intervention by this Court.

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Michigan.

Respectfully submitted,

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Dated: January 8, 1992

APPENDIX TO PETITION FOR CERTIORARI

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DECISION SOUGHT TO BE REVIEWED

-CITED AS 476 N.W.2d 112 (1991)-

(State of Michigan — Supreme Court)

(Argued October 3, 1990; Decided August 26, 1991)

(LOCRICCHIO v EVENING NEWS ASSOCIATION — Docket No. 86351)

BRICKLEY, J.

Two competing legal regimes collide in libel cases implicating First Amendment concerns. Libel law enforces society's "pervasive and strong interest in preventing and redressing attacks upon reputation" caused by false and defamatory statements,[1] while constitutional law safeguards the free flow of ideas and opinions on matters of public interest that lie at "the heart of the First Amendment's protection."[2] The inherent analytical tension between these regimes requires a court both to protect reputational interests, and to accord "breathing space" to principles of freedom of press and speech. It remains a precarious task to balance these interests in cases, such as this one, that pit

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[1] *Rosenblatt* v *Baer*, 383 US 75, 86; 86 S Ct 669; 15 L Ed 2d 597 (1966). Justice Stewart's concurring opinion underscored that libel law's protection of reputation from defamatory falsehoods "reflects no more than our basic concept of the essential dignity and worth of every human being, — a concept at the root of any decent system of ordered liberty." (Stewart, J., concurring). *Id.* at 92.

[2] *First Nat'l Bank of Boston* v *Bellotti*, 435 US 765, 776; 98 S Ct 1407; 55 L Ed 2d 707 (1978).

private-figure plaintiffs against a report by a media defendant on a matter of public interest.[3] This case tosses into the balance the tortuous issue of libel by implication, in contrast to specific allegations of defamatory false statements of fact.

For our purposes, the controversy began in 1979,[4] when the Detroit News published a four-part series of articles entitled "The Pine Knob Story." In response, the owners and developers of Pine Knob, plaintiffs Joseph Locricchio and Gary Francell, sued the Evening News Association (hereinafter the Detroit News) and its reporters for libel in 1980.[5] The plaintiffs alleged that the entire tenor of the Pine Knob series falsely implied that plaintiffs were members or associates of organized crime, but did not identify any specific false statements in the articles.

The Detroit News attacked the plaintiffs' failure to identify any specifically false factual statements, and moved for summary judgment. Both the trial court and the Court of Appeals denied the summary judgment motion. The case went to trial.

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[3] This opinion elucidates in later sections that "[a] traditionally . . . strong affinity [exists] between first amendment jurisprudence and [public discourse]." Post, *The constitutional concept of public discourse: Outrageous opinion, democratic deliberation, and* Hustler Magazine v Falwell, 103 Harv L R 603, 627 (1990).

[4] The plaintiffs' original action also included allegations of defamation arising from articles published by Detroit News columnist Pete Waldmeir in 1972 and 1977, and an editorial published by Detroit News editor Bill Giles in 1979. Only the Pine Knob series of articles remains at issue on appeal.

[5] The plaintiffs also sued for invasion of privacy, intentional infliction of emotional distress, and contractual interference. These counts have been dismissed, and only the libel allegations remain in dispute.

A jury trial of prodigious length ultimately produced a three million dollar verdict for plaintiff Francell.[6] However, the trial court ruled that the evidence regarding falsity did not support the jury's verdict, and directed a verdict for the Detroit News. The plaintiffs appealed the posttrial directed verdict, and prevailed. The Court of Appeals, citing its previous opinion on summary judgment, applied the law of the case doctrine to reverse the trial court, and reinstated the jury award.

This appeal can be said to involve essentially two issues. First, did the Court of Appeals err in reversing the trial court's directed verdict and reinstating the jury verdict in favor of the plaintiffs? Second, can a private-figure plaintiff recover damages in a media-defendant/public-interest subject matter libel action where the plaintiff alleges defamatory implication but fails to identify or prove any materially false factual statements or implications or omissions?[7]

We answer the first question affirmatively, and hold at the outset that the Court of Appeals erred in relying on the law of the case doctrine to reverse the trial court's

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[6] The jury inexplicably found no publication of facts to a third party with regard to plaintiff Locricchio and accordingly awarded him zero damages.

[7] The parties do not dispute the configuration in this case of private-plaintiff/public-interest/media-defendant. This opinion generally refers to the media/nonmedia status of parties in the descriptive rather than a normative sense. Dicta suggests that a majority of the Supreme Court believes that "in the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities." *Dun & Bradstreet* v *Greenmoss Builders, Inc*, 472 US 749, 784; 105 S Ct 2939; 86 L Ed 2d 593 (1985), (Brennan, J., dissenting). See note: *The burden of proving truth or falsity in defamation: Setting a standard for cases involving nonmedia defendants*. 62 NYU L R 812, 840 (1987) (noting that the "Supreme Court has yet to decide whether [the media-nonmedia] distinction is necessary or even viable").

directed verdict, instead of independently reviewing the record in a libel case of First Amendment import. We find it unnecessary under the facts presented to answer the second question as posed because of a lack of proven falsity in either the underlying facts or in their implication, and hold simply that the plaintiffs failed to carry their burden of proving either false and defamatory factual statements or false implications. Accordingly, the Court of Appeals erred in reinstating the jury verdict in favor of plaintiffs.

I.
FACTUAL BACKGROUND

The facts presented show that editorial superiors at the Detroit News asked veteran reporters Michael Wendland and Jean Gadomski to investigate rumors of organized crime involvement in the plaintiffs' Pine Knob entertainment complex in 1978. Reporters Wendland and Gadomski conducted an intensive two-month investigation of the Pine Knob facility in 1979. Their investigation reached its apex with an audiotaped interview conducted with the plaintiffs (in the presence of their attorney) in April of 1979.

The interview with the plaintiffs, and the independent research of the Wendland-Gadomski team, sowed the seeds for the four-part "Pine Knob Story" series of articles that ran in the Detroit News from April 22 to 25, 1979. The centrality of the Pine Knob series to this lawsuit leads us to detail the content of the four articles below.

A. The First Article: "The Pine Knob Story: How 2 Friends And Hustle Created A Big Resort, Millions In Debts And A Question: 'Is It Mafia?'"

The first article appeared under the rather sensational headline above. Its opening paragraph described the plaintiffs as "land gamblers . . . [p]ower brokers with

the right connections — widely suspected to be 'Mafia.'" The article quoted plaintiff Locricchio as conceding "the feeling 'Pine Knob is Mafia' is so widespread that 'even my mother sometimes has her doubts.'" The article noted that although the plaintiffs "vehemently deny mob involvement, they admit that they are on 'all the computer lists' as organized crime figures."

The first article further noted that plaintiffs agreed to talk to the Detroit News, in their words, to "clear the air." It provided provocative details of the plaintiffs' backgrounds, informing readers, for example, that the plaintiffs "wear silk shirts, drive expensive [cars] and fly about the country in their own twin-engine airplane."

The report asserted that "[Locricchio] is proud of his Sicilian heritage and protective of his large family. He is outgoing and talkative." It described Francell in contrast as "quiet, almost shy," and noted that "Francell is of French and German heritage." The report stated that although the plaintiffs felt "[a]ngered by what they claim is harassment from the FBI, the Internal Revenue Service and state and local law enforcers, they nevertheless say they can see why 'people think we're mob.'"

The report then detailed four key incidents, which essentially comprise the gravamen of plaintiffs' defamation by implication claims, in what the authors described as "the confusing, often incredible story" of how the plaintiffs created Pine Knob. The article summarized these four incidents as consisting of:

1) Two unsolved murders with links to people who figured in Pine Knob's development.

2) A so-called money wash designed to hide the source of a $200,000 loan to Pine Knob.

3) "A $4 million cost overrun" by the plaintiffs in the building of a Las Vegas Hotel theatre.

4) Several investors associated with organized crime who either lent or helped [the plaintiffs] raise large sums of money.

The article sketched the history of Pine Knob from the original ownership in the 1950s to the plaintiffs' acquisition in 1971, asserting that "[t]he stories of mob involvement in Pine Knob began with [the acquisition of Pine Knob by reputed organized crime-associated investors in 1962]." The plaintiffs purchased Pine Knob from these investors in 1971.

The authors reported that the plaintiffs confronted financial troubles virtually from the moment they acquired Pine Knob: troubles so severe that by 1972 the partners "needed a tremendous cash flow [but] didn't have it." The report asserted that the plaintiffs' financial condition had so dramatically deteriorated that

> [by] the summer of 1972, [the plaintiffs] were in the worst financial bind of their careers. They needed $200,000 — "desperately," says Locricchio — to stave off foreclosures on outstanding notes. The partners would get the money. But in doing so, they would become involved in an incredible financial intrigue to be investigated by three federal grand juries. More than anything else, it was that loan that put Locricchio and Francell on the organized crime lists.

The first article ended with a trailer in bold letters that proclaimed: "Tomorrow: A money wash and two murders."

B. The Second Article: "The Pine Knob Story: How [A] Loan Got Washed."

As promised, the second article appeared under the above headline on Monday, April 23, 1979. It focused mainly on two incidents: the unsolved 1972 and 1974

murders of Agnes Brush and Harvey Leach, and a $200,000 loan the plaintiffs obtained to finance the Pine Knob complex in 1972.

Page one of the article displayed a photograph of an automobile with its trunk open. The caption under this photograph announced, "Harvey Leach's car was found with his body in the trunk." The authors pointed out that "Locricchio and Francell say they know nothing about either [the Leach or Brush] killing . . . . A score of police agencies have investigated the murders and have not proved otherwise."

The second article also asserted that "[the plaintiffs] agree that their business connections, when diagramed on a blackboard, make them appear to be 'organized crime figures,'" and paraphrased Locricchio as asserting "that such a diagram, drawn by police agencies, as well as his Sicilian heritage, has unfairly put the sign of the Mafia on Pine Knob."

It recounted that an unknown assailant had stabbed bookkeeper Agnes Bush to death three months after her employer, William Magill, loaned $200,000 to the plaintiffs for Pine Knob financing. The article described the late Harvey Leach as a "Southfield furniture magnate," who "had been working with [the plaintiffs] on construction plans for a chain of furniture stores, called Joshua Doore. Loans negotiated through the same Toronto money broker [that engineered the so-called money wash of the Magill loan] financed the building of those stores."

The article quoted Locricchio's version of how the controversial $200,000 Magill loan originated as follows:

> I called [Pine Knob business associate Adele Volpe] and said I needed $200,000 for a month, two months . . . . [Volpe] said he couldn't

> help, but he'd see what he could do. [Volpe] called me back. He said, "I have this friend. His name is Bill Magill. He'll give you the money."

However, because Magill feared that disclosure of his finances might endanger the safety of his daughter, he insisted as a condition that the plaintiffs conceal the source of the loan.

Citing an FBI interview with Magill in 1973, the authors noted that although Magill had never met the plaintiffs, he "withdrew all but $5,000 of his life savings to loan [the plaintiffs] $200,000." It also quoted an investigating FBI agent who asked, "Why on earth would two sensible people take all their savings and give it to a relative stranger without any security . . . ?" The article asserted that the plaintiffs failed to repay the Magill loan until 1977, and then only "after Magill began a foreclosure procedure against Pine Knob."

The article then described the intricate method the plaintiffs employed to keep secret the source of the Magill loan with the help of "an old friend, Southfield attorney Fred Gordon." The authors noted that Gordon had "once before . . . helped Locricchio find a private money source" by putting Locricchio in touch with reputed organized crime figure Leonard Schultz in the late 1960s. The article quoted Locricchio as explaining that "Freddy [Gordon] had a brainstorm. He said, 'Look, instead of borrowing the money (directly from Magill), we'll use the money for collateral for another loan.'" The article described the logistics of the Magill "money wash" as follows:

> On July 25, 1972, [the plaintiffs] picked up the $200,000 from Magill. The next day, Francell drove to Toronto with the money. Gordon flew there. Together, they entered the offices of

> Toronto attorney Joseph Burnett, who ran a large, international real estate financing company. Francell gave Burnett the cash. In turn, Burnett gave the Pine Knob partners a $200,000 loan, the check drawn on one of Burnett's companies, thus hiding Magill's role in the transaction. *While the transaction was legal, it was highly unorthodox* . . . . [Emphasis supplied.]

The final part of the article discussed the links between "people involved in laundering the $200,000 Magill loan" and the murders of Agnes Brush and Harvey Leach. It noted that "Locricchio and Francell . . . are puzzled by the coincidences. But they say they are only coincidences."

C. The Third Article: "The Pine Knob Story: A Brush With Bankruptcy."

The third article in the series appeared under the above headline. It focused on the financial problems the plaintiffs experienced in 1975, partly as a result of FBI harassment, and detailed that the plaintiffs had obtained loans from a number of reputed organized crime figures. The article asserted that "[t]he partners were even overdue in paying their accountants" and quoted Locricchio as lamenting, "'We couldn't get any financing through banks. We were up to here.'" It continued by stating that "[t]he financial difficulties were but part of their troubles, say Locricchio and Francell. At this time the FBI showed up to tell them they were going to be indicted [regarding the $200,000 Magill loan]."

The article pointed out that a federal grand jury ultimately indicted the plaintiffs for "lying about the Magill loan on a mortgage application from a federally insured bank" in 1977. The plaintiffs pleaded guilty and were

fined $500. The article stated that "[i]t is the only time either man has been convicted of a crime."

The article also described how Locricchio had secured a bid from reputed organized crime figures James Tamer and Charles Goldfarb to construct a "Pine Knob-like" music theatre at the Aladdin Hotel in Las Vegas. The article stated that "Locricchio estimated construction costs [of the music theater] at $6 million . . . [i]t ended up costing $10 million." It quoted an affidavit from the 1978 indictment of Goldfarb and Tamer on charges to illegally control the Aladdin's gambling casino "as claiming that Locricchio was secretly offered a 'piece' of the Aladdin in exchange for his [construction] work on the music theater." It also referred to unnamed sources who claimed that "the FBI questioned whether the $4 million cost overrun was possibly an illegal 'bonus' to Locricchio," and described how the FBI tried to get Locricchio to serve as a "snitch" against suspected organized crime involvement in the Aladdin hotel's gambling casino, an offer which he refused.

D. The Fourth Article: "The Pine Knob Story: Partners Stalked By Mafia-Hunters."

The final article in the series appeared under the above headline. Despite the headline, this article really had little to do with stalking by "Mafia-hunters." The article actually began on an upbeat note, asserting that "[t]he owners of Pine Knob entertainment complex . . . are bouncing back from near bankruptcy and a public impression they are 'Mafia.'" It quoted Locricchio as boasting, "We ain't the Rock of Gibraltar yet . . . [but the Pine Knob facilities] are so strong that in spite of all (the problems), we're going to overcome. There's no doubt now."

The article went on to note that the Pine Knob complex turned a $700,000 profit in 1977-78. It quoted

Locricchio as chalking up the FBI attention to "his Sicilian heritage and his business success." Locricchio conceded close acquaintances with numerous "alleged Mafia members," but contended that the government harassment because of these acquaintances amounted to guilt by association. The rest of the article described the relationship between the partners. It ended by noting that the "partners worry that the intensive law enforcement investigations into their activities over the last eight years will continue to haunt them."

II.
PROCEDURAL HISTORY

Four important events, outlined as follows, chart the procedural history of this case: the pretrial denial of summary judgment, the trial on the merits, the trial court's directed verdict, and the Court of Appeals reversal of the directed verdict.

A. The Trial Court And Court Of Appeals Denials Of Summary Judgment.

The plaintiffs' original and subsequent amended complaints alleged "[t]hat by the entire tenor of these publications, Defendants acted in reckless disregard of the falsity of their publications and said . . . that Plaintiffs Locricchio and Francell were persons engaged in organized crime and engaged in a continuing course of criminal misconduct or conduct of an immoral or reprehensible nature in both their personal and business relationships."

The plaintiffs' complaints did not identify a single false statement that appeared in the Pine Knob articles. The defendants moved for summary judgment before trial. They contended that the absence of allegations of specific false statements in the complaint negated any issue of material fact. The trial court denied the motion.

Rebuked by the denial of summary judgment, the defendants countered with a number of interrogatories that asked the defendants to identify each alleged false statement in the Pine Knob series. The plaintiffs responded tersely:

> [T]he defamation allegations contained [in the complaint] are not necessarily based on a false statement(s) in any one particular article, but rather, . . . the entire series of articles . . . injured the reputations of plaintiffs as the same represented a false portrayal, implication, imputation and/or insinuation . . . .

Unsatisfied with this response, the defendants once again moved for summary judgment on the plaintiffs' libel claims, rearguing that no genuine issue of material fact existed because of the failure of the plaintiffs to allege any specific false statements of fact. Once again, the trial court disagreed, and denied defendant's summary judgment motion.

The Court of Appeals granted leave on interlocutory appeal to resolve the issue and issued its opinion in August 1983.[8] The Court of Appeals rejected the argument that the absence of specific allegations of false statements of fact mandated dismissal on summary judgment. The Court of Appeals relied on three cases to reach this conclusion: *Sanders* v *Evening News Ass'n*, 313 Mich 334, 340; 21 NW2d 152 (1946), *Caldwell* v *Crowell-Collier Publishing Co*, 161 F2d 333, 335-336 (CA 5, 1947), cert den 332 US 776 (1947), and *Memphis Publishing Co* v *Nichols*, 569 SW2d 412, 419-420 (Tenn, 1978).

From *Sanders*, the Court of Appeals extracted the maxim that "'[t]o test its libelous quality, a publication

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[8] **This Court subsequently denied interlocutory appeal, and the United States Supreme Court denied certiorari.**

is to be considered as a whole, including the character of the display of its headlines when the article is published in a newspaper, and the language employed therein.'" *Id.* at 340. From *Caldwell* and *Nichols*, the Court of Appeals extrapolated the proposition that "[i]nsinuation, imputation or inference may be as defamatory as a direct, unveiled assertion." Having thus affirmed the theoretical validity of a cause of action for defamation by implication, the Court of Appeals held that "[t]he pleadings give rise to a genuine issue of material fact which is to be left to the trier of facts and cannot be disposed of by summary judgment," and remanded the case for trial.

B. The Trial.

The case proceeded to a sometimes vitriolic trial. One of the most controversial trial issues involved the authenticity and veracity of the tapes and transcripts from the Detroit News' interview of the plaintiffs in 1979.[9] The plaintiffs controverted many of the quotes from the taped interview that appeared in the Pine Knob series. The tape apparently had very poor sound quality and much contention reigned during the trial over what the plaintiffs had actually said or not said on the tape.

Reporter Michael Wendland, the lead author of the Pine Knob series, provided crucial testimony at trial. At the time of the trial, the law required a private plaintiff suing a media defendant on a report of public interest to prove actual malice.[10] Accordingly, much of Wend-

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9 The reporters had agreed to provide the plaintiffs and their attorney a duplicate copy of the taped interview. At trial, the plaintiffs contended that Detroit News had actually provided a blank copy.

10 Our decision in *Rouch* v *Enquirer & News of Battle Creek*, 427 Mich 157; 398 NW2d 245 (1986), subsequently rejected the actual malice standard of liability in private-figure/public-interest cases.

land's cross-examination targeted his state of mind regarding the truth of his factual reporting. Specifically, the plaintiffs' attorneys attempted to show that Wendland did not personally believe either that Locricchio and Francell were actually organized crime members or that Pine Knob was Mafia-owned.

On cross-examination Wendland testified, "I don't think there's organized crime involvement in the ownership of Pine Knob. I think organized crime has been involved in . . . helping your clients finance Pine Knob, and I also testified I don't think your clients are organized crime members."

Wendland also testified that he did not use the term "money wash" regarding the $200,000 Magill loan to impute illegality, but rather to convey that "[the loan] was obscuring the source of the funds . . . what this loan did . . . was to hide the source of the money. And that is certainly unusual. That's a money wash."

The plaintiffs' trial attorney also tried assiduously to show that the Pine Knob series contained factual inaccuracies or omissions. He ultimately secured two admissions from Wendland regarding factual inaccuracies. First, Wendland conceded that the second Pine Knob article erroneously stated that a "score of police agencies" had investigated the plaintiffs regarding the Leach and Brush murders. Wendland could in fact name only fourteen, not twenty agencies, that had investigated the Leach/Brush murders, including three federal grand juries and the Internal Revenue Service. Wendland explained, "We use [the phrase 'a score'] I think, a lot, you know, meaning a great many, certainly more than a few.

Second, Wendland conceded inaccuracy regarding the picture of Harvey Leach's car under the caption, "Harvey Leach's car was found with his body in the

trunk," that appeared in the second article. Wendland testified the caption "should have said — I mean, that makes it sound like it happened today, and my gripe was that it should have said in 1974."

Wendland stood by the factual accuracy of the rest of the series. He conceded that the question printed throughout the articles, "Is it Mafia?" arguably referred to the plaintiffs, whose names were synonymous with Pine Knob. However, when asked if the articles ever stated an answer to the question "Is it Mafia?" Wendland replied:

> I think all four articles answer that question . . . if you read . . . your client's response to this constant attention, constant rumors, you'll see them saying, "No, we are not Mafia" . . . [M]y job is to report the facts, put all the facts out there for people to make up their mind. And that's what we did in this story. [The plaintiffs] over and over again, point it out how these rumors have pervaded over their whole lives and how these rumors are not true.

Pressed by his cross-examiner about the accuracy of the statement attributed to Locricchio in the Pine Knob series "'that [a hypothetical organized crime diagram] drawn by police agencies, as well as his Sicilian heritage, has unfairly put the sign of the Mafia on Pine Knob,'" Wendland replied that the statement comprised not a direct quote, but rather [an accurate] "paraphrase of the entire discussion" with the plaintiffs.

The plaintiffs' attorney tried also to show falsity in the first Pine Knob article's assertion that "[s]everal investors associated with organized crime . . . either lent or helped Locricchio and Francell raise large sums

of money . . . ." Wendland refused to concede this statement contained material falsity, explaining that

> at the very start . . . when [the plaintiffs] first bought Pine Knob, one of the parties who owned it was a guy named Arthur Rooks. I think another owner was Alex Kachinko. Both of those people were associated with organized crime, and [the plaintiffs] bought Pine Knob from those people.
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> * * *
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> [Pine Knob] was sold, I think, for a little over a million dollars on a land contract. In effect, Mr. Rooks, [Mr.] Kachinko . . . became the bankers. They held the land contract. I'm interpreting that to mean, in effect, they lent [plaintiffs] the money . . . . As the holder of the land contract, they had a very strong interest in Pine Knob . . . [the term "lent"] fit into that more than anything else. That's probably not entirely accurate, but it was — in effect, they ended up being owed money, lending money, they had an interest in it.

The plaintiffs' expert, one Professor Robert Bjork, a doctor of cognitive psychology at U.C.L.A., also provided crucial testimony at trial. The plaintiffs' attorney asked Dr. Bjork whether "the typical readers [of the Pine Knob series would] associate my clients, Mr. Locricchio and Mr. Francell, with [the murders of Agnes Brush and Harvey Leach]?" Bjork replied:

> I believe they would end up thinking that somehow those murders are related somehow to the financial goings-on. I don't believe they would [necessarily] conclude [that] Mr. Locricchio and Mr. Francell were involved personally in some way.

The plaintiffs' attorney also asked Professor Bjork's opinion regarding "whether or not the four [Pine Knob] articles . . . when read by a typical reader, created an impression that Mr. Locricchio and Mr. Francell are associated with organized crime?" Bjork replied, "In my opinion . . . the typical reader would end up thinking that Mr. Locricchio and Mr. Francell *have some kind of connection* with organized crime." (Emphasis supplied.)

For their part, the defendants essentially mounted a defense of truth against the plaintiffs' libel allegations. The defendants tried to demonstrate throughout the trial that the plaintiffs did in fact have numerous ties to individuals with organized crime backgrounds, that rumors of organized crime ties to Pine Knob originated long before the publication of the Pine Knob series, and that the articles contained no material falsehoods or omissions of fact.

At the conclusion of the proofs, the trial court instructed the jury that "[i]t is the Plaintiffs' burden of proof to satisfy you by a preponderance of the evidence that the statements or innuendoes complained of were false in some material respect and published with actual malice.[11] Plaintiffs will not have satisfied their burden of proving material falsity if you find that the Detroit News articles were substantially true." The defendants moved for a directed verdict, which the trial court took under advisement pending the jury's return of a verdict.

The jury returned special verdicts in September 1985. It found in respect to plaintiff Francell that the Detroit News published the articles, that the articles contained false and defamatory statement(s), and that the defendants had knowledge that the statement was false or

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11 See n 10.

acted with reckless disregard regarding its falsity. The jury awarded Francell three million dollars in actual damages. With respect to plaintiff Locricchio, the jury awarded no damages after finding no publication, i.e., that the defendants did not disseminate false and defamatory facts to a third party through printing, writing, or pictures.

C. The Trial Court's Directed Verdict.

The trial court ruled on the defendant's motion for a directed verdict in December 1986. It approvingly cited the newly released Supreme Court decision in *Philadelphia Newspapers, Inc* v *Hepps*, 475 US 767; 106 S Ct 1558; 89 L Ed 2d 783 (1986). From *Hepps*, the trial court extrapolated that "[w]here allegedly defamatory speech is of public concern, the First Amendment demands and Michigan law requires that the plaintiff, whether public official, public figure, or private individual, prove the statements at issue to be false." The trial court then held that "the plaintiffs have failed to prove the publications at issue contained significantly false facts, and a verdict must be directed for the defendant."

The trial court further stated that "[i]nsinuation, imputation, or inference may be as defamatory as a direct unveiled assertion." The trial court nevertheless concluded that "liability cannot be imposed for journalistic inferences arising from the reporting of true facts about matters of public interest and concern. The plaintiff must prove the false impression arises from untrue, or undisclosed facts."

The trial court then compiled a fourteen-paragraph list of facts that it found "are true; or at least, [that] the plaintiffs have not proven them to be false." The court concluded:

> "[1] Plaintiffs purchased Pine Knob from individuals who had been indicted by a federal

grand jury for concealing their ownership interests in a Las Vegas hotel.

"[2] Plaintiffs' names appeared on the organized crime lists of the Federal Bureau of Investigation.

"[3] Plaintiffs were personal friends of, or had done business with, innumerable individuals whose names are commonly associated with organized crime, including Leonard Schultz, Dominic Corrado, Joseph Burnett, Fred Gordon, James Tamer, Charles Goldfarb, Harvey Leach, Charles Monazym and Jack Tocco.

"[4] In the course of their investigations, agents of the Federal Bureau of Investigation spoke with plaintiffs' bankers and referred to plaintiffs' as 'crooks.'

"[5] A federal grand jury indicted plaintiffs on three counts of filing false statements on a loan application made to Detroit Bank & Trust.

"[6] Plaintiffs pleaded guilty in federal court to giving false information on an application for a loan, in violation of Federal law.

"[7] The bulk of the financing required to develop Pine Knob occurred after the publication of the 1972 Detroit News Article that plaintiffs claim caused 'all their problems.'

"[8] Plaintiffs' names surfaced in the investigations of both the Agnes Brush and Harvey Leach murders. The Detroit News, in its coverage of those two investigations, never identified plaintiffs as suspects, but the Detroit News did identify (at that time and in the 1979 series) a 61 year old laborer as the only suspect in the Agnes Brush murder.

"[9] Plaintiffs told the Federal Bureau of Investigation in 1973 that they were already then tired of hearing rumors that organized crime was connected with their business.

"[10] Plaintiffs furnished a legal memorandum and statements by their attorneys confirming for The Detroit News their allegations that the Federal Bureau of Investigation had harassed them by visiting their lenders and bankers from 1973 through 1977.

"[11] Joseph Locricchio admitted in previous testimony and in this trial that he knew of the Federal Bureau of Investigation's special interest in James Tamer and of the agency's investigation into hidden ownership of the Aladdin Hotel and Casino before he went to Las Vegas at James Tamer's request.

"[12] Despite speculation to the contrary, the only evidence on record shows plaintiffs were turned down in 1976, well before the complained of publications, for loans because of 'high living,' a reputation that they were not prompt with payment of their debts, and rumors of organized crime involvement. No evidence has been introduced, and no banker has testified that they relied on the complained of publications in turning down plaintiffs' loan applications.

"[13] Plaintiffs admit a separation between themselves and their primary lender, Borg Warner, for acts prior to May, 1978 and resulting legal actions in which plaintiffs attributed millions of dollars in damage to the businesses to Borg Warner.

"[14] Plaintiffs admit filing a lawsuit against the Hilton Hotel chain, The Reminder Newspaper,

> and several individuals, blaming them for the defeat of the referendum that would have allowed plaintiffs proposed hotel and for causing plaintiffs $ 100,000,000 in damages."

D. The Court Of Appeals Reversal Of The Directed Verdict.

The plaintiffs appealed the trial court's ruling, and the Court of Appeals issued a two-page opinion overturning the trial court and reinstating the jury verdict in February 1989. In the view of the Court of Appeals,

> [t]he legal question in this case was whether plaintiffs could have a cause of action for libel where their allegations of defamation were not based on a specific false statement in any particular article.

The Court reversed the trial court's directed verdict because, "[o]ur first opinion in this case answered that question affirmatively."

The Court of Appeals further opined that "the United States Supreme Court's decision in *Philadelphia Newspapers, Inc, supra*, [does not] bar[] a suit for defamation by implication." The Court of Appeals held accordingly that "[i]n light of our previous opinion and our belief that subsequent law has not eliminated defamation by implication, we reverse the trial court's order granting [the directed verdict] and reinstate the jury's verdict."

III.
ANALYSIS

A. The Law Of The Case Doctrine, Libel Verdicts, And Independent Appellate Review.

The trial court, in effect, independently reviewed the record to determine whether the jury's verdict con-

formed to the constitutionally mandated burden of proof regarding falsity. In contrast, the Court of Appeals implicitly relied on the law of the case doctrine to reverse the trial court's directed verdict by adverting to its prior summary judgment ruling that a cause of action exists for defamation by implication. This Court noted in *CAF Investment Co* v *Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981), that the law of the case doctrine,

> [a]s generally stated, [provides that] if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.

The law of the case doctrine exists primarily to "maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit."[12] In this sense, the law of the case doctrine is an analytical cousin of the doctrines of claim and issue preclusion. However, as Justice Holmes recognized almost a century ago, unlike the later doctrines, the law of the case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power."[13]

We do not here question the generally sound principles of efficiency, comity, and finality that animate the

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12 Wright, Miller & Cooper, Federal Practice & Procedure, §4478, p 788.

13 *Messenger* v *Anderson*, 225 US 436, 444; 32 S Ct 739; 56 L Ed 1152 (1912). See also *Safir* v *Dole*, 231 US App DC 63; 718 F2d 475 (1983) (the law of the case doctrine is discretionary and does not preclude courts from reëxamining issues that address their constitutional power).

law of the case doctrine. However, in a libel case affecting constitutionally protected public discourse, the law of the case doctrine should not have precluded a second review by a subsequent Court of Appeals panel. Indeed, in such cases the law of the case doctrine must yield to a competing doctrine: the requirement of independent review of constitutional facts.[14]

The determination on summary judgment that the plaintiffs' complaint stated a cause of action for defamation by implication should not have abrogated the appellate court's duty to independently review the record to determine whether, in fact, the plaintiffs carried their burden of proof at trial regarding falsity at the posttrial directed verdict stage.[15] The application of the law of the case doctrine in this case clearly contravened the principle enshrined in the celebrated case of *New York Times* v *Sullivan*, 376 US 254, 270; 84 S Ct 710; 11 L Ed 2d 686 (1964), that discourse on matters of public interest should remain "uninhibited, robust, and wide-open . . . ."

Sullivan announced that appellate courts must conduct an independent review of the record to ensure that no "forbidden intrusion on the field of free expression" has occurred in libel cases involving the issue of actual malice. *Id.* at 285.[16] *Sullivan* mandated that reviewing

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14 *Harte-Hanks Communications, Inc* v *Connaughton*, 491 US 657, 688; 109 S Ct 2678; 105 L Ed 2d 562 (1989). "In determining whether [a] constitutional standard has been satisfied, the reviewing court must consider the factual record in full."

15 In any event, the law of the case doctrine does not bind this Court upon review of a decision of the Court of Appeals.

16 The actual malice standard of *Sullivan* requires a public figure or official to first establish a false utterance, and, second, to prove that "it was [made] with reckless disregard of whether it was false or not." 376 US 280.

courts in libel cases "'examine for [themselves] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.'" *Id.*

The Supreme Court strongly reiterated the requirement of independent review in *Bose Corp* v *Consumers Union of the United States, Inc*, 466 US 485, 505, 514; 104 S Ct 1949; 80 L Ed 2d 502 (1984). *Bose* held that "the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times* v *Sullivan*." The *Bose* Court reasoned that "the question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'" *Id.* at 511.

Similarly, in *Harte-Hanks Communications, Inc* v *Connaughton*, 491 US 657, 686; 109 S Ct 2678; 105 L Ed 2d 562 (1989), the Supreme Court reviewed the entire record to determine if the evidence supported a finding of actual malice. The Court reaffirmed that "the question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *Id.* at 685. The Court reiterated that "[o]ur profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of

'breathing space' so that protected speech is not discouraged." *Id.* at 686.[17]

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[17] Certainly, the *Harte-Hanks* Court "construed the constitutional mandate of independent appellate review very narrowly" as compared to *Bose* and *Sullivan. Rassel, Stewart & Niehoff,* Connaughton v Harte-Hanks *and the independent review of libel verdicts,* 20 U Tol L R 681, 694 (1989).

The concurring opinion of Chief Justice CAVANAGH advances *Harte-Hanks* for the proposition that appellate courts "need *not* independently review 'the historical facts — e.g., who did what to whom and when . . . .'" *Post,* pp 136-137, citing the concurring opinion of Justice White. Initially, it must be said that our reading of *Harte-Hanks* does not find that "four concurring justices made explicitly clear" that they agree with Justice White's concurrence. In any event, even Justice White, with whom Chief Justice Rehnquist *alone* concurred conceded that the "reckless disregard component of the . . . 'actual malice' standard is *not* a question of historical fact." *Id.* at 694. (Emphasis supplied.)

Second, appellate analysis of actual malice in libel cases necessarily involves a threshold determination of falsity, since proof of actual malice requires proof of both falsity and reckless disregard of falsity. Third, in reviewing a libel verdict an appellate court does not and should not exercise review of credibility determinations, disregard previous factfindings, or create new factfindings. Rather, the court should exercise independent judgment regarding whether, as a matter of constitutional law the evidence in the record supports the verdict. The Court of Appeals in this case failed to perform an independent evaluation of the evidence in accordance with the constitutional principles enumerated in this opinion.

The trial court, in contrast, clearly conducted an independent review of the existing record. The concurrence suggests that independent review of the burden of proving falsity inherently involves reviewing credibility of witnesses. Yet the record emphatically demonstrates that the trial court did not examine credibility in its independent review of the jury's verdict. Its evaluation concerns not primarily "who did what to whom and when," but whether a constitutionally permissible quantum of evidence supported a judgment consistent with libel law and First Amendment principles. As the *Bose* Court noted, "the rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or a trial judge. 466 US 501; see also *Time* v *Pape,* 401 US 279, 284; 91 S Ct 633; 28 L Ed 2d 45 (1971): "[I]n cases involving the area of tension between the First and Fourteenth Amendments on the one hand and state defamation laws on the

(*concluded on page A-26*)

We recognize that, unlike the instant case, the cases from *Sullivan* to *Harte-Hanks* involved public figures and, accordingly, mandated independent review for the issue of actual malice. In *Gertz* v *Welch*, 418 US 323; 94 S Ct 2997; 41 L Ed 2d 783 (1974), the Court held that the actual-malice standard of liability for actual damages articulated in *Sullivan* does not govern cases, such as the instant one, that involve a media defendant's report on a matter of public interest concerning a private-figure plaintiff.

However, in *Philadelphia Newspapers* v *Hepps*, *supra* at 768-769, the Supreme Court held that "where a newspaper publishes speech of public concern, a private-figure plaintiff cannot recover damages without also showing that the statements at issue are false." In abrogating the common-law presumption of falsity in libel cases, the Court in *Hepps* created an issue of constitutional fact regarding whether a plaintiff carries the burden of proving falsity.

We therefore conclude that an independent appellate review of the burden of proof with regard to falsity in private-figure, public-interest cases deters "forbidden intrusion on the field of free expression" as a logical corollary to independent review of actual malice. *Sullivan*, *supra* at 285. The Court recognized in *Hepps*, that imposing liability for true statements amounts to the imposition of liability without fault proscribed by *Gertz*. A jury verdict against the great weight of the evidence

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(*continued from page A-25*)

other, we have frequently had occasion to review 'the evidence in the . . . record to determine whether it could constitutionally support a judgment' for the plaintiff." The task of the reviewing appellate court in a libel case is not to conduct an inquiry regarding who did what to whom, but rather to independently examine the record as a whole to insure that the burden of proof with respect to falsity has been satisfied.

regarding the falsity requirement, unreviewed by a court, would therefore comprise a forbidden intrusion on protected speech, in the same way as would a failure to review for clear and convincing evidence of actual malice.[18]

In *Rouch* v *Enquirer & News of Battle Creek*, 427 Mich 157; 398 NW2d 245 (1986), this Court, following *Gertz*, rejected the actual-malice standard of liability in cases involving private-figure plaintiffs and a media defendant's report on matters of public interest.[19] Our rationale in *Rouch* in part rested on an acknowledgement of the "even greater protection" afforded defamation defendants by the burden of proof as to falsity. *Id.* at 198. That protection would indeed ring hollow if, at least in cases implicating public-interest subject matter and media defendants, no effective review existed to ensure compliance with the burden of proof.[20] The Court of

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18 The logic of *Anderson* v *Liberty Lobby, Inc*, 477 US 242, 252; 106 S Ct 2505; 91 L Ed 2d 202 (1986), supports this reasoning. In *Anderson*, the Court was "convinced that the inquiry involved in a ruling on a motion for summary judgment *or for a directed verdict* necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits. . . . The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict . . . ." (Emphasis added.)

19 *Rouch* designated negligence as the applicable standard of liability for actual damages in such cases. The standard of liability is thus now settled law in Michigan and not at issue in this case.

20 It is worth noting in this connection that the doctrine of independent review reflects an inherent distrust of allocating unlimited decisional power to juries in the First Amendment context. Thus, "much of contemporary first amendment doctrine, theory, and commentary is devoted to protecting speech *from* the jury. . . . The common wisdom is that if juries were given more decisional power in [First Amendment cases], either by increasing the range of issues they could consider or by granting juries greater immunity from appellate review, free speech would suffer a crippling blow." Schauer, *The role of the people in First Amendment theory*, 74 Cal L R 761, 765 (1986).

Appeals application of the law of the case doctrine accordingly fails to accord the necessary "breathing space" to protected speech. The principle of independent review logically extends to determining whether a plaintiff satisfies her burden of proving falsity. *Id.*

A remand in this case of plaintiffs' libel claims for further proceedings on the merits would normally flow from our determination that the Court of Appeals erred in relying on the law of the case doctrine to reverse the trial court.[21] However, in the interest of clarifying the operation of constitutional principles under the facts of this case, of judicial economy, and of the long-suffering litigants, we bypass this customary procedure and conduct an independent review and analysis of the record in the following sections.

B. Analysis Of The Plaintiffs' Defamation Claims.

An analysis of the plaintiffs' defamation by implication claims requires an examination of three interlocking factors: the elements of libel under Michigan law, constitutional requirements and principles informing and attenuating Michigan libel law, and the contours of defamation by implication as shaped by the two preceding factors. Our examination of the legal principles of libel law in Michigan, as informed by the First Amendment, leads us to conclude that defamation by implication in private-figure/public-interest media cases requires proof of both defamatory meaning and falsity, a burden not carried by plaintiffs under these facts.

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21 **Amicus curiae, Michigan Trial Lawyers Association, incorrectly suggest that *Bufalino* v *Detroit Magazine, Inc*, 433 Mich 766; 449 NW2d 410 (1989), mandates a remand in this case. The *Bufalino* majority acknowledged explicitly that "[w]e can, as a practical matter, simply decide the merits of the issue on the basis of the record before us." *Id.* at 774. Moreover, unlike *Bufalino*, a summary judgment case, the instant case comes before us after extensive pretrial and posttrial arguments.**

1. The essential elements of libel: defamatory meaning and falsity.

Michigan law has traditionally defined a defamatory communication as one which "'tends so to harm the reputation of [persons so] as to lower [them] in the estimation of the community or to deter [others] from associating or dealing with [them].'" *Nuyen* v *Slater*, 372 Mich 654, 662, n *; 127 NW2d 369 (1964). A cause of action for libel encompasses four components: 1) a false and defamatory statement concerning the plaintiff, 2) an unprivileged communication to a third party, 3) fault amounting to at least negligence on the part of the publisher, and 4) either actionability of the statement irrespective of special harm or the existence of special harm caused by publication. A cause of action for libel requires a plaintiff to show defamatory meaning as well as falsity, fault, and publication.

Michigan law has also long recognized that the regime of libel law may not impose damages for injuries to reputation arising from a press report of materially true facts about a public figure on a matter of public interest. In *Sanders* v *Evening News Ass'n, supra* at 337, a former judge of the Common Pleas Court sued the Detroit News for two newspaper articles that exposed "'the problem of overnight releases of persons arrested for misdemeanors — releases made by the police at the telephoned request of judges.'" Both articles reported an incident where the plaintiff personally intervened to order the release of a person held in custody at a police station. The first article reported that "'former Judge Joseph Sanders walked into Bethune Station one night, banged his gavel on the startled sergeant's desk, and shouted: "'Court's in session, the Honorable Joseph Sanders presiding. Bring in Joe Doakes!"'"

The second article, appearing the following day, stated that "'[there has almost always] been a judge or two, bound to a bondsman or lawyer or either by affection or campaign contribution, or overimpressed by judicial prerogatives, who has turned the order (of the head of the police department not to release on telephone request) into a farce. Witness the case of . . . the impromptu court session held in Bethune Station by former Judge Joseph Sanders.'" *Id.* at 339.

The *Sanders* Court reviewed the record and concluded that no liability existed for the first article "because in his amended declaration plaintiff admits the truth of the . . . publication in so far as it could possibly tend to support an action for libel. Since that publication was true, it was not libelous." *Id.* at 340.

The Court then reviewed the substance of the second article, under the venerable principle that "'[t]o test its libelous quality, a publication is to be considered as a whole, including the character and display of its headlines when the article is published in a newspaper . . .'" *Id.* The Court first held that the plaintiff lacked authority to hold court in a police station to release a prisoner, and therefore had acted in his private, not official capacity. It concluded that "[i]n doing so plaintiff acted without lawful authority and it was not libelous for defendants to publish an article to that effect . . . [f]urther, it was not libelous to say in the alternative of plaintiff 'or (he was) over-impressed by judicial prerogatives' since such appears to be the truth from plaintiff's own pleading." *Id.* at 342-343.

The logic of *Sanders*, while instructive, does not foreclose every cause of action for defamation by implication. However, the *Sanders* rationale does prohibit imposing liability on a media defendant for facts it pub-

lishes accurately and without material factual omissions about public affairs.

2. Constitutional liability requirements: public discourse, private plaintiffs, and the burden of falsity.

In addition to satisfying Michigan libel law elements, this private-figure/public-interest subject matter libel case must also comply with the constitutional elements of libel law, including falsity and the burden of proof. The common-law roots of defamation have been fundamentally altered by a series of cases from the highest court in the land, beginning with *Sullivan, supra*. The Supreme Court's First Amendment analysis of libel cases since *Sullivan* has variously employed three important factors to define the parameters of libel liability: the public- or private-figure status of the plaintiff, the media or nonmedia status of the defendant,[22] and the public or private character of the speech. The Court has most consistently interpreted the First Amendment to accord maximum protection to public speech about public figures.[23]

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[22] It can hardly be disputed that the Supreme Court has rarely "breathed life into the [First Amendment's] press clause [so as to provide] the outlines of a press-speech distinction." Note, *Press to trial: The press clause, the libel dilemma, and the media-nonmedia distinction*, 39 Syracuse L R 795, 812 (1988). Nevertheless, much of the Court's libel jurisprudence has unequivocally sought to constrain publishers from imposing anti-free speech "self-censorship." *Sullivan*, 376 US 279. See, e.g., *Gertz*, 418 US 247 (explicitly restricting its holding to media defendants), *Hepps*, 475 US 779, n 4 ("Nor need we consider what standards would apply if the plaintiff sues a nonmedia defendant"). See also note, Philadelphia Newspapers v Hepps, *revisited: A critical approach to different standards of protection for media and nonmedia defendants in private plaintiff defamation cases* 58 Geo Wash L R 1268, 1281 (1990): "[A]lthough the [Supreme] Court has never clearly embraced the media-nonmedia distinction, it has never explicitly rejected it either."

[23] See, e.g., *Hepps* at 775. "When the speech is of public concern and the plaintiff is a public official or public figure, the Constitution clearly requires the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law."

The Court has acted more ambiguously in the context of private-figure plaintiffs, as presented in this case. In *Gertz*, the Court focused on the status of the plaintiff and concluded that private-figure plaintiffs deserve more reputational protection than do public-figure plaintiffs for two reasons. First, the Court postulated that unlike public figures, private-figure plaintiffs lack access to "channels of effective communication" that would allow them "a more realistic opportunity to counteract false statements . . . ." *Id.* at 344. Second, unlike public figures, private-figure plaintiffs do not voluntarily expose themselves to the risk of defamation by injecting themselves into public controversy. The Court concluded that "[p]rivate individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater." *Id.*

Just as the Court has postulated that private-figure plaintiffs deserve greater libel law protection vis-à-vis public-figure plaintiffs, it has also consistently recognized that speech on matters of public concern merits heightened protection under the First Amendment. The Court has declared, for example that the First Amendment "embraces at least the liberty to discuss publicly . . . all matters of public concern."[24] and similarly that "expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'"[25]

The Court's protection of speech on the basis of its public character reached its zenith in the plurality

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24 *Thornhill* v *Alabama*, 310 US 88, 101; 60 S Ct 736; 84 L Ed 1093 (1940).

25 *NAACP* v *Claiborne Hardware Co*, 458 US 886, 913; 102 S Ct 3409; 73 L Ed 2d 1215 (1982). See also *Thornhill*, n 24, *supra*, *Rosenblatt*, *supra* at 386: "There is, first, a strong [constitutional] interest [in protecting] debate on [public issues]."

opinion of *Rosenbloom* v *MetroMedia, Inc*, 403 US 29; 91 S Ct 1811; 29 L Ed 2d 296 (1971). The plurality in *Rosenbloom* suggested that the actual-malice standard articulated in *Sullivan* should extend to both private- and public-figure plaintiffs if the defamatory statement involved "matters of public or general concern." *Id.* at 44. The Court repudiated this position in *Gertz*, and instead focused on the plaintiff's public or private status to set the standard of liability. However, in *Hepps*, the Court again emphasized the public character of the speech (and the danger of media self-censorship) to set the applicable burden of proof with regard to falsity.

Similarly, in *Dun & Bradstreet* v *Greenmoss Builders, Inc*, 472 US 749, 759; 105 S Ct 2939; 86 L Ed 2d 593 (1985), the Court emphasized that speech on matters of public concern lies at the heart of the First Amendment, while, "[i]n contrast, speech on matters of purely private concern is of less First Amendment concern." While *Gertz* prohibited the imposition of punitive damages in private-figure/public-interest cases absent a showing of actual malice, *Dun & Bradstreet* held that "permitting recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern." *Id.* at 763.

The United States Supreme Court has also "consistently sought to ensure that liability does not arise from true speech on public matters."[26] In *Sullivan, supra* at 271, the Court stated unequivocally:

> Authoritative interpretations of the First Amendment guarantees have consistently

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[26] **Note, *The burden of proving truth or falsity in defamation: Setting a standard for cases involving nonmedia defendants*, 62 NYU L R 812, 829 (1987).**

> refused to recognize an exception for any test of truth . . . and especially one that puts the burden of proving truth on the speaker.

Similarly, in *Garrison* v *Louisiana*, 379 US 64, 74; 85 S Ct 209; 13 L Ed 2d 125 (1964), the Court noted that "[t]ruth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." More recently, "[b]oth [*Hepps*] and [*Dun & Bradstreet*] evince a special solicitude for speech of public concern and desire to ensure such speech adequate breathing space, the one by its allocation of burden of proof, the other by its limitation on damages."[27] In parallel fashion, this Court has long recognized, as in *Sanders*, that Michigan law prohibits libel liability for true speech on matters of public concern.

Although the Court has stated clearly that true speech about matters of public concern may not subject a speaker to libel sanctions, it has paradoxically more extensively elucidated the standard of fault than it has the quantum or quality of falsity in libel cases.[28] At best, it can be said that the Court has struggled analytically to balance private reputational interests against public free expression in the context of falsity. On the one hand, the Court has asserted that "[f]alse statements of fact" are constitutionally valueless because

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27 Note, *The fact-opinion determination in defamation*, 88 Colum L R 809, 833 (1988).

28 See, e.g., *Hepps*, *supra* at 775: "Our opinions to date have chiefly treated the necessary showings of fault rather than falsity." The actual-malice inquiry of public-figure cases generally focuses on the actions and state of mind of the publisher rather than the quantum of proof of falsity adduced by the plaintiff, See, e.g., *Herbert* v *Lando*, 441 US 153, 176; 99 S Ct 1635; 60 L Ed 2d 115 (1979) (requiring plaintiffs in defamation actions to "focus on the editorial process and [to] prove a false publication attended by some degree of culpability").

such statements "interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counterspeech, however persuasive or effective."[29] On the other hand, the Court has also asserted that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz, supra* at 341.

The more recent decision in *Hepps* clearly indicates adherence to the latter paradigm of protecting some degree of falsity to ensure greater First Amendment protection of speech on public interest matters. The Court in *Hepps, supra* at 776, recognized that "forcing the plaintiff to bear the burden of proving falsity [will result in some cases where] plaintiffs cannot meet their burden despite the fact that the speech is in fact false." Nevertheless, the Court ultimately concluded "that the Constitution requires us to tip [the scales] in favor of protecting true speech," despite the dispositive nature of burden of proof in cases presenting ambiguous evidence regarding falsity. *Id.* In this connection, it seems clear that claims of defamation by implication, which by nature present ambiguous evidence with respect to falsity, face a severe constitutional hurdle.

As noted previously, the requirement that a private plaintiff suing a media defendant for libel in a public interest matter would have to "prove as part of his case, in addition to defendant's fault, that the statements at issue are false" comprised an important factor for our decision in *Rouch* to strip public interest state-

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29 *Hustler Magazine* v *Falwell*, 485 US 46; 108 S Ct 876; 99 L Ed 2d 41 (1988). The Holmesian concept of the "marketplace of ideas" plays a central role in all First Amendment jurisprudence. See, e.g., *Abrams* v *United States*, 250 US 616, 630; 40 S Ct 17; 63 L Ed 1173 (1919) (Holmes, J., dissenting).

ments of heightened actual malice protection from liability. *Rouch, supra* at 204. However, although *Hepps* "stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law . . . where a media defendant is involved,"[30] neither *Hepps* (nor our decision in *Rouch*) specified whether the standard of proof with regard to falsity is "'clear and convincing evidence' or some lesser standard."[31] We need not address that issue in this case because the record does not reveal that the plaintiffs proved any material falsity by even a preponderance of the evidence.

C. Defamation By Implication.

1. The court of appeals analysis.

The Court of Appeals recognized that a number of cases have held that a cause of action exists for defamation by implication.[32] However, the cases it relied on bear little relation to the case presented here. The 1947 case of *Caldwell* v *Crowell-Collier Publishing Co, supra,* has little, if any precedential value to present libel law or to the case at bar. In that case, Caldwell, the Governor of Florida, sued a magazine for its editorial contrasting Caldwell's expressed social views on a racial lynching in Florida to those of his counterpart governor of North Carolina. The editorial stated:

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30 *Milkovich* v *Lorain Journal Co,* 497 US __, __; 110 S Ct 2695; 111 L Ed 2d 1, 18 (1990).

31 Prosser & Keeton (5th ed), Torts, 1988 supp, §116A, p 117.

32 As will be seen, we do not, and need not, disagree in theory with the conclusion of the Court of Appeals that a cause of action for libel by implication might succeed without a direct showing of false statements. We do disagree with its failure to conduct a review of the sufficiency of the evidence of falsity for any such libel by implication, as did the trial court.

> [Governor Caldwell] said he did not consider [the incident] a lynching. He went on to opine that the mob had saved courts, etc., considerable trouble . . . thus [Governor] Cherry of North Carolina expresses the forward-looking view of these matters, while Caldwell of Florida expresses the old narrow view which has been about as harmful to southern white people as to southern negroes [sic]. [*Id.* at 334.]

The federal circuit court held that Caldwell had asserted an action for libel, noting that "[i]f the imputations published hold the Governor up as indifferent to a lynching in his State . . . they grievously reflect on him in his office, and if false and unprivileged are actionable per se, injury and damage being implied." *Id.* at 336.

It is doubtful that the *Caldwell* decision comprises good law today, and in any event its facts have little bearing on the instant case. *Caldwell* involved a public-figure plaintiff, whereas this case involves private figures. The old common-law presumption of damages no longer controls libel cases involving public figures, having been supplanted by the *Sullivan* actual-malice requirement. Moreover, the burden of proof of falsity now lies with the plaintiff, not with the defendant as in *Caldwell*. Finally, unlike the instant case, the plaintiff in *Caldwell* did in fact allege specific false statements of fact and material omissions.

The Court of Appeals also relied on *Memphis Publishing Co* v *Nichols*, 569 SW2d 412 (Tenn, 1978), in its summary judgment and reversal of the directed verdict for the defendants. *Nichols* involved a plaintiff's suit for libel against a newspaper that published an account of a domestic shooting. The news account reported that

> "[the shooting incident] took place Thursday night after the suspect arrived at the [plaintiff's]

> home and found her husband there with Mrs. Nichols. Witnesses said the suspect fired a shot at her husband and then at Mrs. Nichols, striking her in the arm, police reported." [*Id.* at 414.]

Mrs. Nichols sued the paper, arguing that the article "falsely implied that Mrs. Nichols and . . . the assailant's husband, were having an adulterous affair, and were 'caught' by [the assailant]." The proofs at trial showed that "not only were Mrs. Nichols [and the assailant's husband] at the Nichols' home, but so, also, were Mr. Nichols and two neighbors, all of whom were sitting in the living room, talking, when [the assailant] arrived around three o'clock in the afternoon." *Id.*

The Tennessee Supreme Court rejected the newspaper's argument that "every material fact in the article quoted . . . was true." The court concluded that "[t]he publication of the complete facts could not conceivably have led the reader to conclude that Mrs. Nichols and Mr. Newton had an adulterous relationship. The published statement, therefore, so distorted the truth as to make the entire article false and defamatory." *Id.* at 420.

As in the instant case, *Nichols* involved a private-figure plaintiff suing a media defendant about a matter of public interest. However, while well reasoned, the *Nichols* case incorrectly states the current law of libel with respect to the burden of proving falsity. In *Nichols* (a 1978 case), the court asserted that a plaintiff "need not show . . . that the statement is false. There is a legal presumption of falsity which the defendant may rebut by proving truth as a defense." *Id.* at 420. As indicated earlier, *Hepps*, obliterated the common-law presumption of falsity in libel actions.

Moreover, the defamatory implication alleged by the plaintiff in *Nichols* identified clear-cut and specific material omissions of reported facts, in contrast to the plain-

tiffs' claims in this case. The information omitted from the *Nichols'* report damaged the plaintiffs' reputation as effectively as a direct false statement. The defendant's article would have conveyed an undisputedly nondefamatory meaning had it reported that Mrs. Nichols' husband and other people were present during the shooting.

In contrast, in the instant case, the plaintiffs have failed to identify or prove material omissions which, if published, would have rendered the Pine Knob series nondefamatory. *Nichols* arguably stands for the proposition that material omissions from reports of true facts are capable of creating a defamatory impression. In the instant case, however, the plaintiffs have not shown that material omissions occurred or how they operated to defame them.

Both the trial court and the Court of Appeals obliquely referred to *Herbert* v *Lando*, 781 F2d 298 (CA 2, 1986).[33] While not precisely on point, *Herbert*, a public-figure/actual-malice case, is instructive with regard to the operative significance of claims of defamation by implication. Herbert, a retired Army colonel who served in Viet Nam, sued CBS and the Atlantic Monthly for print and broadcast reports that cast doubt on the truth of Herbert's claims that military superiors relieved him of his command for reporting war crime atrocities.

Unlike the instant plaintiffs, Herbert specified nine defamatory statements he claimed the defendants pub-

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33 It must be noted here that no consensus exists within the various federal circuits on the issue of defamation by implication. See, e.g., *Price* v *Viking Penguin, Inc*, 881 F2d 1426, 1432 (CA 8, 1989), cert den 493 US 1036 (1990) (refusing to recognize defamation by implication). *Pierce* v *Capital Cities Communications, Inc*, 576 F2d 495 (CA 3, 1978), cert den 439 US 861 (1978); *Woods* v *Evansville Press Co*, 791 F2d 480, 486 (CA 7, 1986) (an implied statement, just as a statement made in direct language, can be defamatory).

lished with actual malice. The district court and the federal circuit court rejected each of these claims. Moreover, they rejected Herbert's claims that the overall defamatory effect of the reports comprised a separate basis for recovery.

The federal circuit court distinguished "an overall defamatory impact" from "a particular defamatory implication . . . ." It reasoned that in certain circumstances, "a combination of individual statements [not in themselves defamatory] might lead the reader to draw an inference that is damaging to the plaintiff." However, the court reasoned that no cause of action would lie where "the defamatory 'impact' of the publication is the same as the defamatory implication conveyed by each of the individual statements." *Id.* at 307. Because the court had previously found that each defamatory implication alleged by the plaintiff had not been published with actual malice — i.e., reckless disregard of falsity, it concluded that "to permit Herbert to rest a cause of action . . . on the publication's 'overall impact' would be a meaningless gesture, since the defamatory implications of the specific statements and the overall impact of the publications are identical." *Id.* at 308.

Although the *Herbert* court recognized the possibility of an "overall impact" separate and apart from the "implications of the specific statements," it applied the same standard of fault — in that case actual malice — to both types of defamation.

2. Cases cited by the plaintiffs.

The plaintiffs mistakenly argue that "no constitutional issue is raised by this appeal, and the only legal question [presented] is whether, under the common law of Michigan, implication, insinuation or inference may support a defamation action." On the contrary, the legal

question presented whether, in alleging defamation by implication, the plaintiffs carried their burden of proving falsity, is one of constitutional import. In cases challenging reports by the media on matters of public interest, the decision in *Hepps*, dictates that a private-figure plaintiff bears the burden of proving falsity.

Many of the cases cited by the plaintiffs for the proposition that a cause of action exists for defamation by implication have little bearing on this case. *Randall* v *Evening News Ass'n*, 79 Mich 266; 44 NW 783 (1890), involved a cartoon that implied a legislator had improperly received funds from the alcohol lobby. The logic of *Sullivan* would clearly foreclose that case today absent a showing of falsity and actual malice. *Bronkowski* v *Arlan's Dep't Store*, 12 Mich App 88; 162 NW2d 347 (1968), and *Smith* v *Fergan*, 181 Mich App 594; 450 NW2d 3 (1989), involved private-figure plaintiffs alleging libel for purely private-interest matters. As noted earlier, the logic of *Dun & Bradstreet, supra*, suggests that the private-figure/private-interest subject matter configuration does not trigger heightened First Amendment scrutiny. *Hodgkins Kennels, Inc* v *Durbin*, 170 Mich App 474; 429 NW2d 189 (1988), another case cited by plaintiffs, properly read, does not involve claims of defamation by implication.

The plaintiffs' arguments often confuse the issue of defamatory meaning with the issue of falsity. The plaintiffs cite *Schultz* v *Reader's Digest Ass'n*, 468 F Supp 551, 554 (ED Mich, 1979), where the district court held that a published article's "impression that Mr. Schultz may have been involved in 'setting up' Jimmy Hoffa to be murdered . . . is clearly defamatory." However, even assuming that the Pine Knob series as a whole conveyed a defamatory

impression, the plaintiff still bears the burden of proving underlying falsity.[34]

Ironically, the plaintiff also cites *Doughtery* v *Capitol Cities Communications, Inc*, 631 F Supp 1566 (ED Mich, 1986) for the proposition that "the defamatory tone of a radio broadcast which resulted from the omission of known facts was capable of supporting plaintiff's defamation action even though plaintiff could not point to a single specific statement in the broadcast that was defamatory and false." In *Doughtery*, the district court soundly trounced the plaintiff's arguments for defamation by implication after reviewing all the evidence, much as the trial court did in this case. As in this case, the court noted that "[a]lthough plaintiff painstakingly presents his version of the story behind each of the broadcasts . . . he does not succeed in uncovering any significant statement about him that is false." *Id.* at 1569. The court went on to hold that "it is impossible to discern any false information in the broadcasts. Each statement made had a factual basis, and where they were not factual statements, . . . they were [nonactionable statements of opinion]. . . ."

The plaintiffs also cite an extensive list of cases from other jurisdictions to illustrate that defamation by implication is a well-established cause of action. We note that many of these cases are inapplicable to the instant case because they involve either public figures, and focus on

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[34] The Supreme Court's opinion in *Milkovich* v *Lorain Journal Co*, *supra*, illustrates this principle. The Court in *Milkovich* noted that "the issue of falsity relates to the defamatory facts implied by a statement. For instance, the statement, 'I think Jones lied' may be provable as false on two levels. First, that the speaker really did not think Jones had lied but said it anyway, and second that Jones really had not lied. It is, of course, the second level of falsity which would ordinarily serve as the basis for a defamation action, though falsity at the first level may serve to establish malice where that is required for recovery." *Id.*, 111 L Ed 2d 18, n 7.

the issue of actual malice not at issue here,[35] or involve private plaintiffs on matters of private interest.[36] In any event, the questions whether a statement is capable of rendering a defamatory implication and whether, in fact, a plaintiff has proved falsity in an implication are separate inquiries. A plaintiff alleging defamation by implication must still prove material falsity. To do otherwise would allow a plaintiff to recover without a showing of falsity, in contravention of the rule announced in *Hepps*. Our review of the plaintiffs' proofs, conducted below, convinces us that the plaintiffs failed to make such a showing.

3. The alleged defamatory implications.

The plaintiffs' primary claim is that the Pine Knob series as a whole falsely implied that plaintiffs were members or associates of organized crime. Although the plaintiffs initially declined to provide any specific allegations of falsity, they argue on appeal that the layout of the Pine Knob articles, including photographs and headlines, as well as the repetition of certain words such as "Mafia," "Sicilian," and "money wash," and indeed certain specific statements, contribute to the overall implication.

Unfortunately for the plaintiffs, an inescapable implication of the Pine Knob series conforms to the facts devel-

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35 See, e.g., *Cochran* v *Indianapolis Newspapers, Inc*, 175 Ind App 548; 372 NE2d 1211 (1978), *Kelly* v *Iowa State Ed Ass'n*, 372 NW2d 288 (Iowa, 1985), and *Catalano* v *Pechous*, 83 Ill 2d 146; 419 NE2d 350 (1980). Similarly, the Chief Justice's concurrence urges application of *Strada* v *Connecticut Newspapers, Inc*, 193 Conn 313; 477 A2d 1005 (1984). However, our reading of *Strada* finds that case so replete with language about public figures as to provide virtually no guidance in the instant private plaintiff case.

36 See, e.g., *Moritz* v *Medical Arts Clinic, PC*, 315 NW2d 458 (ND, 1982), *Geyer* v *Steinbronn*, 351 Pa Super 536; 506 A2d 901 (1986), and *Lewis* v *Equitable Life Assurance Co*, 389 NW2d 876 (Minn, 1986).

oped at trial: the plaintiffs had numerous financial and social connections with reputed organized crime figures and these associations contributed in the financing of Pine Knob and prompted intense investigative scrutiny, if not harassment, from law enforcement authorities.[37] Although capable of defamatory interpretation, the implications alleged by the plaintiffs do not arise from false facts or material omissions, and, standing alone, are not even proven by the plaintiffs to be false.

The plaintiffs it would seem, want to have it both ways regarding their defamation by implication claims. On the one hand, they assert that the articles as a whole disseminate false implications. On the other, they point to statements or headlines in isolation from the whole, such as the use of the word "lent" in the statement that "[s]everal investors associated with organized crime[] either lent or helped Locricchio and Francell raise large sums of money." However, the plaintiffs did directly or indirectly obtain loans and other financial assistance from reputed organized crime figures. Construing the articles as a whole, the plaintiffs have failed to show false implications by a preponderance of the evidence.

Similarly, the headlines in the series, while arguably inflammatory, do not convey false implications apart from the context of the reported facts. The two partners did indeed, through "hustle" create "a big resort, millions in debts, and a question: 'is it Mafia?'" The partners did indeed attempt to create a "money wash" by obscuring the source of the Magill loan. The partners did indeed have a "brush with bankruptcy" in the course of

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37 **The evidence at trial indicated that investigative interest by law enforcement agencies (and the resulting adverse effect on the ability of the plaintiffs to obtain traditional sources of financing) predated the publication of the Pine Knob series by a number of years.**

financing Pine Knob. While the headline that the partners were "stalked by Mafia-hunters" was somewhat misleading, since the "Mafia-hunters" were not stalking the plaintiffs, the headline falls into the category of permissible rhetorical hyperbole.

The most troubling aspect of the Pine Knob series lies in the photograph in the second article of the automobile under the caption, "Harvey Leach's car was found with his body in the trunk." Reporter Wendland conceded that the picture should have said, "in 1974," and it is also troubling that the caption did not say where the murder occurred. Again, however, the articles must be construed as a whole, and the article later pointed out that intensive investigations by law enforcement agencies failed to link the plaintiffs to the Leach (or Brush) murders.[38]

4. The burden of proving falsity in defamation by implication.

It has been said that "there is a great deal of the law of defamation which makes no sense."[39] One might say of the case law regarding defamation by implication. As noted earlier, the federal circuits and the various state courts remain divided over both the viability and the analytical contours of a cause of action for defamation by implication.[40] For our part, we are not convinced that defamation by implication is so analytically distinct from

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38 The statement that "a score" of agencies had investigated the Leach/Brush murders, while technically false, is not defamatory, in that it implies that many agencies tried, but failed, to link the plaintiffs to the murders, thus strengthening an inference that the plaintiffs did not in fact commit the murders.

39 Prosser & Keeton, n 31 *supra*, p 771.

40 See, e.g., note, *The art of insinuation: Defamation by implication*, 58 Fordham L R 677, 682-683 (1990): "Some courts permit and others prohibit a cause of action for defamation by implication. Unfortunately, they articulate their positions infrequently."

defamation by explicitly false facts as to require a departure from the guiding principles of general libel and First Amendment libel law. In the absence of clear authority to the contrary, and in light of the current contours of First Amendment libel law, we conclude that an action for defamation by implication must still conform to the three guiding constitutional principles discussed above: speech on public matters initiates heightened First Amendment protection, true speech on public affairs cannot accrue liability, and a plaintiff bears the burden of proving falsity. Additionally, a litigant alleging defamation by implication, like any other libel plaintiff, must demonstrate a statement or implication capable of defamatory meaning and prove falsity and fault by, at minimum, a preponderance of the evidence.[41]

The properly framed issue in this private-figure/public-interest media report case is not whether, in the abstract, a plaintiff can ever prevail by alleging defamation by implication, but rather whether the plaintiffs have proven both statements (or implications) capable of defamatory interpretation and falsity. Our review of the plaintiffs' arguments and the alleged defamatory implications lead us to agree with the trial court that the plaintiffs here failed to carry their burden of proving the falsity either of the statements or the implications at issue.

CONCLUSION

After a careful review of Michigan libel law, as informed by the latest constitutional pronouncements on the sub-

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[41] **Our review has disclosed no case where a plaintiff prevailed by alleging defamation by implication without a showing of either direct or underlying material falsity, or a material omission of true facts. The question what standard of liability would most appropriately apply in such a case — actual malice or negligence — need not be addressed under the facts in this case, and thus remains a question for a future case.**

ject, it is our considered judgment that, to the extent this media defendant can be liable for defamation by implication arising from underlying published statements of fact not proven to be false and where no omission of material facts exist, such defamation by implication would at least have to pass the same standards of falsity, fault, and burden of proof as would establish liability for defamation by statements of fact.

Under the heightened standard of appellate review required in public-interest libel cases, we conclude that the plaintiffs have failed to meet this burden, and, accordingly, we reverse the decision of the Court of Appeals and reinstate the trial court's directed verdict.

BOYLE, RILEY, and GRIFFIN, JJ., concurred with BRICKLEY, J.

CAVANAGH, C. J. (*concurring in the result*).

I agree with the result reached by my Brother BRICKLEY'S opinion. I reach that result, however, by a somewhat different route. For the reasons stated below, I believe plaintiffs' defamation claim is insupportable as a matter of law, and that defendants were entitled to pretrial summary judgment when they so moved in 1982.[1] I therefore agree that defendants are now entitled to a reversal of the Court of Appeals judgment presently before us, and a reinstatement of the circuit court's

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[1] **The circuit court denied defendants' second motion for summary judgment in 1982, and the Court of Appeals affirmed. We did not approve that decision, but simply denied interlocutory leave to appeal. 419 Mich 860 (1984). The United States Supreme Court denied certiorari. 469 US 1018 (1984). With the benefit of 20/20 hindsight, this Court, in my view, should have granted leave to appeal in 1984 and should have reversed the Court of Appeals decision at that time.**

directed verdict. I adopt Justice BRICKLEY'S thorough statement of the facts.

I.
APPELLATE REVIEW OF FALSITY

At the outset, I must respectfully disagree with my Brother BRICKLEY'S conclusion that the underlying factual issue of falsity is subject to independent appellate review as a "constitutional fact" question. See BRICKLEY, *ante*, pp 113, 118-123. While I sympathize with the free speech concerns which animate my colleague's analysis, I believe that analysis blurs the distinction between the defamation plaintiffs' acknowledged constitutional *burden* of proving falsity, and the nature of the issue of falsity itself.

As my colleague correctly notes, see BRICKLEY, *ante*, p 113, the First Amendment requires a defamation plaintiff, at least in a case involving speech of public concern, to bear the burden of proving falsity. See *Philadelphia Newspapers, Inc* v *Hepps*, 475 US 767; 106 S Ct 1558; 89 L Ed 2d 783 (1986). It does not follow, however, from the fact that constitutional principles require a certain party to bear a certain burden of proof on a certain issue at trial, that an appellate court must or should independently review the merits of the issue. For example, in a criminal case the government is constitutionally required to bear the burden of proving the defendant's guilt beyond a reasonable doubt. Failure to so instruct the jury is grounds for reversal. See *In re Winship*, 397 US 358; 90 S Ct 1068; 25 L Ed 2d 368 (1970). But if the jury is properly so instructed and finds the defendant guilty, constitutional principles have never been thought to require appellate courts to independently review the underlying factual issue of guilt, and thereby substitute their judgment de novo for that

of the jury. Rather, appellate courts apply the well-established "sufficiency of the evidence" standard, construing the evidence in the light most favorable to the verdict and asking only whether a rational jury could properly have reached that verdict. See *Jackson* v *Virginia*, 443 US 307, 318-319; 99 S Ct 2781; 61 L Ed 2d 560 (1979); *Glasser* v *United States*, 315 US 60, 80; 62 S Ct 457; 86 L Ed 680 (1942); *People* v *Hampton*, 407 Mich 354; 285 NW2d 284 (1979). A similarly deferential standard of appellate review has traditionally been applied to jury verdicts in civil cases. See *Kupkowski* v *Avis Ford, Inc*, 395 Mich 155, 167-168; 235 NW2d 324 (1975); *Dodd* v *Secretary of State*, 390 Mich 606, 612; 213 NW2d 109 (1973).

My colleague would analogize the issue of falsity to the "constitutional fact" issue of "actual malice" in a defamation case, over which appellate courts are constitutionally required to exercise independent review. See, e.g., *Harte-Hanks Communications, Inc* v *Connaughton*, 491 US 657; 109 S Ct 2678; 105 L Ed 2d 562 (1989); *Bose Corp* v *Consumers Union*, 466 US 485; 104 S Ct 1949; 80 L Ed 2d 502 (1984). Another classic example of a constitutional fact question subject to independent appellate review is the voluntariness of a confession. See, e.g., *Arizona* v *Fulminante*, 499 US ___; 111 S Ct 1246; 113 L Ed 2d 302 (1991). Actual malice and the voluntariness of a confession, however, are mixed questions of fact and law. Falsity, by contrast, would appear to be a classic issue of pure historical fact. Indeed, with regard to subsidiary factual questions underlying the ultimate issue of actual malice, the Court in *Harte-Hanks* strongly suggested — and four concurring justices made explicitly clear — that the appellate court need *not* independently review "the historical facts — e.g., who did what to whom and when." 491 US 694 (White, J., joined by Rehnquist, C. J., concurring); see also *id.* at 688 (opinion of the Court); *id.* at 697-699 (Scalia, J., concurring in the judgment); *id.*

at 696 (Kennedy, J., concurring) (indicating agreement with Justice Scalia's analysis).[2]

Not only does it seem clear that the United States Supreme Court is not inclined to find an independent review standard constitutionally required with regard to the issue of falsity, but this Court's own precedents have consistently viewed the determination of truth or falsity in defamation cases as a purely factual question which should generally be left to the jury. See *Steadman* v *Lapensohn*, 408 Mich 50, 53-54; 288 NW2d 580 (1980); *Cochrane* v *Wittbold*, 359 Mich 402, 408; 102 NW2d 459 (1960).[3]

Hepps, of course, has left unsettled the question whether falsity may be proved merely by a preponderance of the evidence, or whether some higher burden (such as "clear and convincing evidence") is constitutionally required.[4] For reasons elaborated below, how-

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[2] Even while reaffirming independent appellate review in the *actual malice* context, the Court in *Harte-Hanks* noted that underlying factual questions like "credibility determinations" are *not* independently reviewed. See *id.* at 688. Justice BRICKLEY himself suggests that his independent review standard would not extend to "credibility determinations." *Ante*, p 112, n 17. Yet the factual issue of falsity will frequently amount to no more and no less than a credibility contest between witnesses at trial. Thus, if Justice BRICKLEY'S independent review standard with regard to falsity is to have any real meaning, it would necessarily have to apply even to credibility issues, a province traditionally reserved most jealously for the jury as trier of fact.

[3] This is not to suggest, in light of free speech concerns, that a jury's finding with regard to falsity should be immune from any effective appellate scrutiny. For reasons elaborated below, I do not think we need to address in this case whether, for example, appellate review of falsity should be limited to the extremely lenient "sufficiency of the evidence" standard traditionally used to review civil jury verdicts, or whether a more searching standard (such as "clearly erroneous" review) should be employed.

[4] See *Hepps*, 475 US 779, n 4 ("[w]e . . . have no occasion to consider the quantity of proof of falsity that a private-figure plaintiff must present").

ever, I believe this case can properly be resolved without any further inquiry into the precise scope of either appellate review of falsity or the constitutional burden of proving falsity at trial. I would simply conclude that there is no proper need or basis in this case to adopt the standard of independent appellate review urged by my colleague.

II.
DEFAMATION ON THE BASIS OF IMPLICATIONS FROM TRUE FACTS

I find it useful to begin by noting the issues which the parties do *not* raise on this appeal. Most significantly, plaintiffs have conceded the truth — or at least that they are unable to prove the material falsity — of all the *specific factual statements* contained in the four disputed articles. Plaintiffs' claim, in a nutshell, is that the articles, taken as a whole, nevertheless conveyed to the average reader certain vague, overall "implications" which plaintiffs claim to be false. These alleged implications, as defined by plaintiffs themselves, boil down to the proposition that plaintiffs "are Mafia."[5] Defendants, for their part, do not challenge the jury verdict on the ground that plaintiffs failed to prove the requisite degree of fault, nor do they challenge the finding that plaintiffs are private rather than public figures. Defen-

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[5] As Justice BRICKLEY notes, plaintiffs, toward the very beginning of this litigation, responded to defendants' interrogatories by stating that

> the defamation allegations . . . are not necessarily based on a false statement(s) in any one particular article, but rather, that the entire series of articles, in their entirety, injured the reputations of plaintiffs as the same represented a false portrayal, implication, imputation and/or insinuation that plaintiffs, among other things, are or were members and/or associates of an organized criminal society, otherwise known as the "Mafia". . . .

dants' defense is essentially one of truth. Defendants both deny that the implications of which plaintiffs complain can fairly be said to arise from the articles, and they contend in any event that, given the conceded truth of the specific factual statements, any overall implications which do arguably arise therefrom are necessarily privileged as "implications from true facts."

Plaintiffs' claim is thus vastly different from the more typical or familiar "defamatory implication" claim. Plaintiffs do not allege that any particular factual statement by defendants is reasonably susceptible of conveying a specific factual implication which is provably false. Nor do they contend that defendants, by selectively omitting crucial relevant facts, have conveyed any misleading factual implication on the basis of otherwise true statements. Rather, they contend that a collection of concededly true factual statements amounts to false defamation because of the inferential or speculative conclusions that the average reader might draw from the totality of those statements. Thus, while it is undoubtedly true, as a general matter, that defamatory implications may be potentially actionable if provably false, the case law cited by plaintiffs reiterating that familiar principle is ultimately inapposite and unhelpful.

I believe the issue in this case, properly framed, is best analyzed by recourse to those cases which have addressed the somewhat elusive problem of "defamation by implications from true facts." While this difficult area of defamation law has not yet been fully explored — and I have no pretensions that this Court can or should presume to offer any definitive solutions today — a number of cases have set forth useful and persuasive analyses of the issue. Perhaps the leading case is *Strada* v *Connecticut Newspapers, Inc,* 193 Conn 313, 323; 477 A2d 1005 (1984), where "the plaintiff [sought] to

recover from a publication where all the underlying and stated facts [were] proved to be true, or substantially true, claiming that the 'slant' of the article [gave] rise to allegedly false and defamatory implications." In a thoughtful and carefully analyzed opinion, the Connecticut Supreme Court concluded that "[t]he goal of nurturing a free and active press in the political arena mandates denial of recovery by a public figure where the allegation of defamation 'depends fundamentally on an interpretation of various aspects of the broadcast, not on anything directly said in it.'" *Id.*

> When any inference or innuendo does not arise from the omission of material facts, but rather from the editorial choice of layout, the plaintiff may not recover for libel by innuendo. The media would be unduly burdened if, in addition to reporting facts about public officers and public affairs correctly, it had to be vigilant for any possibly defamatory implication arising from the report of those true facts. [*Id.* at 326.]

It is true that *Strada* involved the alleged defamation of a public figure, and the court suggested at some points that its rule should be limited to that category of cases. I believe, however, that the gist of *Strada*'s reasoning, if not necessarily its precise contours, properly applies to this case, which, although involving private-figure plaintiffs, involves speech of public concern.[6]

I find highly instructive the reasoning of *Woods* v *Evansville Press Co*, 791 F2d 480 (CA 7, 1986). The court in *Woods*, while conceding that implied defamatory statements may be actionable, and even assuming for

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6 **The issue of possible organized-crime involvement in a major business and entertainment development is certainly of public concern.**

purposes of analysis that the article there at issue could reasonably be read to contain the "defamatory implications" ascribed to it by the plaintiff in that case, see *id.* at 486, held that

> requiring a publisher to guarantee the truth of all the inferences a reader might reasonably draw from a publication would undermine the uninhibited, open discussion of matters of public concern. A publisher reporting on matters of general or public interest cannot be charged with the intolerable burden of guessing what inferences a jury might draw from an article and ruling out all possible false and defamatory innuendoes that could be drawn from the article. [*Id.* at 487-488.]

The court in *Strada* cited a case also discussed by my Brother BRICKLEY, *Memphis Publishing Co* v *Nichols*, 569 S.W.2d 412 (Tenn, 1978), which addressed a claim of defamation by implication from true facts. See BRICKLEY, *ante*, p 124-126. I agree with my colleague that *Nichols* does not support plaintiffs' claim in this case. Indeed, I think the differences between the claims in *Nichols* and this case are very illustrative. The plaintiff in *Nichols* was a gunshot victim who alleged that she was falsely defamed by an article describing the shooting, which occurred at the victim's home. The female assailant's husband was present in the victim's home at the time of the shooting, and he was also fired upon. The defendant newspaper published those facts, which were true as far as they went, but failed to report that the victim's own husband, as well as two other neighbors, were also present at the time, and that the group was simply conversing in the living room. By omitting those crucial relevant facts, the article, while technically true, directly and misleadingly implied that the victim and the

assailant's husband were caught in an illicit, adulterous relationship. See 569 SW2d 414, 419. As the court held:

> The proper question is whether the *meaning* reasonably conveyed by the published words is defamatory . . . . The publication of the complete facts could not conceivably have led the reader to conclude that [the plaintiff] and [the assailant's husband] had an adulterous relationship. The published statement, therefore, so distorted the truth as to make the entire article false and defamatory. [*Id.* at 420. Emphasis in original.]

In this case, by contrast, there is no claim that defendants, by omitting crucial relevant facts, conveyed any skewed or misleading implications. The implications of which plaintiffs complain are simply the ordinary and natural implications that might be expected to flow from the specific factual statements published by defendants, whether taken separately or together. While many of those statements were undoubtedly defamatory, in that they had a tendency to injure the reputations of plaintiffs, they were also concededly true. While the "overall implications" allegedly conveyed by the articles as a whole may also have been defamatory, their thrust was not misleading or different in kind from that of the concededly true specific statements. Rather, the implications, if any, simply reflected the accumulated thrust of the concededly true stated facts. It logically follows that such implications — even if not themselves capable of being either verified or disproven — would necessarily be protected by the same defense of truth shielding the specific factual statements. This is simply not a case, like *Nichols*, where the separate factual ingredients of the publication add up to more than the sum of their parts, to the extent that a collection of

true facts, by the omission of crucial associated facts, ends up conveying an actionably false implication. True facts, whatever their "implications," cannot become actionable simply because they are collected and published together in a straightforward manner.[7]

It is significant that plaintiffs, while conceding the truth of all the specific, concrete factual statements in the disputed articles, define the allegedly false "implications" in exceedingly broad and vague terms. Plaintiffs have been unable to define those implications any more specifically than in terms of the vague and perhaps undefinable proposition that they "are Mafia." Yet, while they strenuously assert the general falsity of that proposition, they have not disputed the essential truth of all of defendants' concrete assertions regarding their specific activities and financial ties to commonly-reputed organized-crime figures.[8] Plaintiffs have conceded that they appear on the lists of organized-crime suspects

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[7] I agree with my Brother BRICKLEY that the one potentially troublesome aspect of the disputed articles is the caption of the photograph in the second article regarding the discovery of Harvey Leach's body in the trunk of his car. See BRICKLEY, *ante*, p 132. The caption itself fails to note the important facts that the body was discovered in 1974, five years before the articles were published, and that plaintiffs were never implicated in the murder. I also agree, however, that this isolated defect, for which defendant reporter Michael Wendland indicated regret at trial, is not enough to support plaintiffs' claim. The caption, taken by itself, does not refer to either plaintiff, and conveys little comprehensible information at all without the background and context provided by the text of the second article. That text accurately, and with reasonable completeness, describes the known facts associated with Leach's murder, including the fact that intensive investigations by numerous law enforcement agencies never found any connection between plaintiffs and Leach's murder.

[8] As the circuit court noted in granting defendants' motion for directed verdict, it is essentially undisputed that "[p]laintiffs were personal friends of, or had done business with, innumerable individuals whose names are commonly associated with organized crime. . . ."

maintained by the Federal Bureau of Investigation. Indeed, plaintiff Locricchio conceded, in an interview before the disputed articles were even published, that rumors of plaintiffs' ties to organized crime and investigations of them by numerous law enforcement agencies had already become so persistent that he feared his own mother might suspect him.

None of this, of course, necessarily establishes that plaintiffs "are Mafia" — however that elusive concept may be defined. I would not presume to speculate, and this Court need not decide, whether plaintiffs "are Mafia." It is noteworthy that defendant reporter Michael Wendland stated at trial his belief — which he believed to be consistent with the content and thrust of the disputed articles — that plaintiffs themselves were *not* directly involved in organized crime, although he believed that organized-crime figures were indirectly involved in financing the Pine Knob development. It is to be hoped, of course, that the average, fair-minded reader would stick to the concededly true facts as presented in the disputed articles, and avoid leaping to speculative or unwarranted conclusions about plaintiffs. But it simply acknowledges human nature to observe that there is no way to guarantee or control what any reader may infer, speculate, or conclude on the basis of facts of which he is made aware.

For purposes of this case, it is enough to conclude, as a matter of law, that a defamation defendant cannot be held liable for the reader's possible inferences, speculations, or conclusions, where the defendant has not made or directly implied any provably false factual assertion, and has not, by selective omission of crucial relevant facts, misleadingly conveyed any false factual implication. In sum, the overall implications that may flow from true factual statements straightforwardly pre-

sented are ordinarily as privileged for defamation purposes as the statements themselves. Any other conclusion, in my view, would unacceptably inhibit the free reporting of news and information of public concern.[9]

III.

CONCLUSION

This Court's concern for the freedom to report opinions and truthful information about people is longstanding. In the very first volume of our Reports, we noted that "[i]n this country, and particularly in this western country, great latitude has been allowed to individuals in speaking and writing 'of and concerning' private and public characters . . . ." *People* v *Jerome*, 1 Mich 142, 144 (1848). In line with this historic concern, and for the reasons detailed above, I agree that the judgment of the Court of Appeals must be reversed, and that the directed verdict in favor of defendants must be reinstated.

LEVIN, J. (*dissenting*).

The signers of the lead opinion conclude that Joseph Judeas Locricchio and Gary Francell[1] failed to prove that

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[9] **My Brother LEVIN would permit recovery against defendants for publishing concededly true facts, simply because those facts inevitably convey unflattering overall implications about plaintiffs. He does not explain how his analysis takes account of the unique and troublesome issues raised in the area of implications from true facts.**

I agree with my colleague, of course, that the mere rephrasing of a statement into the form of a question, whether "Is it Mafia?" or "Is he a womanizer?" cannot immunize the statement. But my colleague overlooks the plethora of concededly true facts in the disputed articles which rendered the provocative headline question a reasonable comment on those facts.

[1] **The verdict awarded Francell damages and found that Locricchio had no cause for action.**

the Pine Knob series published in the Detroit News falsely implied that they "were members or associates of organized crime."[2] The concurrence concludes that the Detroit News is not subject to liability because it "has not made or directly implied any provably false factual assertion, and has not, by selective omission of crucial relevant facts, misleadingly conveyed any false factual implication."[3]

I dissent because there was sufficient evidence for submission to the jury that the Detroit News falsely implied that Locricchio and Francell were members or associates of organized crime.

Michael Wendland, one of the reporters, testified at the trial that he recalled telling Locricchio and Francell, when he interviewed them shortly before the Pine Knob series was run, that "we did not find any organized crime involvement in the ownership of Pine Knob, *nor did we think that your clients were members of the Mafia.*" (Emphasis added.) He added, "I don't believe Gary Francell or Joe Locricchio are members of the Mafia." The follow-up question and answer were:

> *Q.* You knew that when this headline was written, didn't you?
>
> *A.* Yes, I — that was my conclusion.

Nevertheless, the Detroit News published the Pine Knob series which posed the question whether Locricchio's and Francell's investment in Pine Knob was Mafia — "[i]s it Mafia?" — and which linked them to two unsolved murders.

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2 *Ante*, p 89.

3 CAVANAGH, C. J., *ante*, p 144.

Wendland and another reporter who worked on the story, Jean Gadomski, acknowledged that although they had investigated the Harvey Leach and Agnes Brush murders, as far as they could determine, neither Locricchio nor Francell was a suspect. Nevertheless, the Detroit News Pine Knob series linked them to the investigation of those homicides in an article which repeated the question, "Is it Mafia?"

The question in the instant case is whether the jury could reasonably conclude that the Pine Knob series implied that Locricchio and Francell were members or associates of organized crime, and that it was defamatory and false. I would answer the question in the affirmative.

I

The four articles appeared on the front pages of the Detroit News during the four-day period beginning Sunday, April 22, 1979.

The first article began with the headline, "The Pine Knob Story: How 2 friends and hustle created a big resort, millions in debts and a question: 'Is it Mafia?'" Each of the four articles included a caption box, reading:

> In the last eight years Pine Knob, in Oakland County, has developed from a losing ski resort into one of the nation's foremost entertainment complexes, worth millions. During these years the persistent question in Michigan and elsewhere has been "Is it Mafia?"

The first article states that "tangled in the confusing, often incredible story of how [Locricchio and Francell] made Pine Knob, are:

> Two unsolved murders. Though separate, the killings share common elements that lead to some

of the same people who figured in Pine Knob's development.

A so-called "money wash" in which a Toronto firm linked to an associate of Meyer Lansky, the Mafia's key money man, hid the source of a $200,000 Pine Knob loan.

A $4-million cost overrun by Locricchio and Francell in the building of a glittering theater for Las Vegas' Aladdin Hotel and Casino.

Several investors associated with organized crime who either lent or helped Locricchio and Francell raise large sums of money.

The tag line at the end of the first article read:

Tomorrow: A money wash and two murders.

The second article, headlined, "The Pine Knob story, How loan got 'washed,'" featured a photograph of an automobile with its trunk open. The caption under the photograph read, "Harvey Leach's car was found with his body in the trunk." This article was continued on a later page, which led with the headline, "How vital Pine Knob loan was 'washed' in Toronto," and was accompanied by a picture of Leach. The story traced the $200,000 loan, and described the "laundering" process. The article also contained the following statement:

> While the transaction was legal, it was unorthodox and it attracted the attention of the Ontario Provincial Police, who in turn talked to the FBI.

And with regard to the murders,

> Locricchio and Francell say they know nothing about either killing, and insist it is coincidental that some of the same people were involved in

> the loans to Leach and Pine Knob. A score of police agencies have investigated the murders and have not proved otherwise. . . . The only suspect [in the murder of Agnes Brush] was the 61-year-old laborer who worked with Miss Brush.

The third article was headlined "The Pine Knob story, A brush with bankruptcy."

The fourth and last article was headlined, "Partners stalked by Mafia-hunters," and, on the continuing page, "Mafia-hunters stalk Locricchio, Francell."

II

Chief Justice Rehnquist opened his review of the law in one of the most recent pronouncements of the United States Supreme Court, *Milkovich* v *Lorain Journal Co*, 497 US ___; 110 S Ct 2695; 111 L Ed 2d 1, 13 (1990), with the following:

> Who steals my purse steals trash;
> 'Tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands
> But he that filches from me my good name
> Robs me of that which not enriches him
> And makes me poor indeed.
> [*Othello*, act III, scene 3.]

In *Milkovich*, the Court stated that the majority was not persuaded that in addition to the protections of media expression the Court had enunciated, beginning with *New York Times Co* v *Sullivan*, 376 US 254; 84 S Ct 710; 11 L Ed 2d 686 (1964):

> an additional separate constitutional privilege for "opinion" is required to ensure the freedom of expression guaranteed by the First Amendment. [111 L Ed 2d 19.]

The Court turned to the case at hand and said:

> The dispositive question in the present case then becomes whether or not a reasonable factfinder could conclude that the statements in the Diadiun column *imply* an assertion that petitioner Milkovich perjured himself in a judicial proceeding. We think this question must be answered in the affirmative. [*Id.* Emphasis added.]

The "dispositive" question, as stated by the United States Supreme Court in *Milkovich*, whether a reasonable factfinder could conclude that the statements implied an assertion that was defamatory, is long established, and is expressed in the Restatement of Torts as follows:

> § 563. Meaning of the Communication
>
> The meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express. [3 Restatement Torts, 2d, § 563, p 162.]

The Restatement continues that the court determines whether a communication "is capable of bearing a particular meaning," and "whether that meaning is defamatory." The jury determines whether "a communication, capable of a defamatory meaning, was so understood by its recipient." *Id.*, § 614, p 311.

In *Gustin* v *Evening Press Co*, 172 Mich 311, 313; 137 NW 674 (1912), this Court affirmed an order of the circuit court overruling a demurrer to plaintiff's declaration for libel. The article was headlined:

> Goes to Australia.
>
> Alpena Man Turns Over Assets and Seeks New Country.

The Court said that "'the sting of the libel was contained in the headlines,'" and quoted with approval Justice COOLEY'S statement in his work on torts that in determining whether words are libelous, "'they are to be taken in their plain and natural import, according to the ideas they are calculated to convey to those to whom they are addressed . . . .'" *Id.*, p 315.[4]

In *McNair* v *Hearst Corp*, 494 F2d 1309, 1310 (CA 9, 1974), the Seattle Post-Intelligencer had published the following headline and first two paragraphs:

> The High Cost of a Divorce
>
> Five years ago, Barbara Evans hired a lawyer to represent her in a divorce action.
>
> Today the lawyer owns the home, worth between $55,000 and $65,000, which Mrs. Evans received as part of the 1966 divorce settlement . . . .

The court held that a reasonable reader could interpret these words to mean that Mrs. Evans had paid her attorney the value of her house for her divorce, *although the body of the article related the true circumstances* that the lawyer was paid $3000 for the divorce, and obtained the house when the estranged husband failed to make the payments:

> Under Washington law whether an article is true will depend on what it is read to say — on how it would ordinarily be understood by persons reading it [citation omitted]. The question here, as we view it, is whether the article as a whole can be said effectively to have eliminated the impact of any false impression created at the outset. In our judgment this question cannot here

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[4] **1 Cooley, Torts, pp 409-410.**

> be answered as matter of law and remains a question for the jury. [*Id.*]

In *Las Vegas Sun, Inc* v *Franklin*, 74 Nev 282, 286; 329 P2d 867 (1958), the Supreme Court of Nevada considered a series of articles. The court said that the libelous statements were "found, not in the body of the article, but in its headline and tag-line. The headline read,

> "Babies for sale. Franklin black market trade of child told."

The tag-line read,

> "Tomorrow — Blackmail by Franklin."

The body of the article factually recited the manner in which Franklin had secured the relinquishment of a baby for adoption.

The court considered the newspaper's argument "that the headline and tagline cannot be considered apart from the context in which they were used. Thus, they contend, the headline must be qualified by and read in the light of the article to which it referred, and the tagline must be qualified by and read in the light of the subsequent article to which it referred." *Id.* at 287. The court rejected the argument, stating:

> The text of a newspaper article is not ordinarily the context of its headline, since the public frequently reads only the headline. [Citations omitted.] The same is true of a tagline or leader, since the public frequently reads only the leader without reading the subsequent article to which it refers. The defamation of Franklin contained in the headline was complete upon its face. It was not necessary to read the article in order that the defamatory nature of the statement be understood or connected with Franklin. The same is true of the tagline. [*Id.*]

Nor is it determinative here that the sting of the headline concludes with a question mark — "Is it Mafia?":

> A man cannot libel another, by the publication of language, the meaning and damaging effect of which is clear to all men, and where the identity of the person meant cannot be doubted, and then escape liability through the use of a question mark. [*Spencer* v *Minnick*, 41 Okla 613, 617; 139 P 130 (1914).]

A defamatory statement, "He is a womanizer," or "She is a tramp," would not become less so if phrased, "Is he a womanizer?" or "Is she a tramp?"

III

This is not a case where a plaintiff seeks to hold a media defendant "liable for the *reader's* possible inferences, speculations, or conclusions"[5] drawn from a "straightforward" presentation of the facts. The headlines and tag lines, and the persistently posed question, "Is it Mafia?" suggested the inferences, speculations, and conclusions for the reader.

The jury could properly find that a reasonable reader of the Detroit News could understand that the Pine Knob Series not only conveyed the fourteen facts the trial court found to be true, but also that Locricchio and Francell were guilty of a continuing course of criminal wrongdoing generally associated with organized crime and membership or association in the "Mafia," including involvements in the murders of Agnes Brush and Harvey Leach, and an illegal money laundering scheme, and that the communication was defamatory and false.

MALLETT, J., took no part in the decision of this case.

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5 CAVANAGH, C. J., *ante*, p144.

MOTION [*FOR SUMMARY JUDGMENT*]

(State of Michigan — Circuit Court — County of Wayne)

(Proceedings of April 2, 1982)

(JOSEPH LORICCHIO [*sic*], et al, Plaintiff, -vs- THE DETROIT NEWS, et al, Defendant – No. 80 012 415 CZ)

BEFORE THE HONORABLE SUSAN D. BORMAN, JUDGE
Detroit, Michigan – Friday, April 2, 1982

APPEARANCES:
Mr. Jeremiah Kenney, on behalf of the Plaintiffs;
Mr. James Stewart, on behalf of the Defendants

* * *

(3) Detroit, Michigan
Friday, April 2, 1982

THE CLERK: Joseph Loricchio [*sic*] versus The Evening News.

THE COURT: Who's the moving party?

MR. STEWART: I am, your Honor, James Stewart on behalf of the Detroit News and all defendants. This is a motion for summary judgment, your Honor, as to the plaintiff's libel claims alone. The basis for the motion is the plaintiff's answers to our fourth set of Interrogatories.

The claim is based, your Honor, the plaintiff's claims are based on a series of articles in the Detroit News. We have been here a number of times where I have attempted to find out exactly what factual statements the plaintiffs claim are false.

I have been unsuccessful on most of those occasions.

Finally, we have the court ordering forty-seven Interrogatories being answered, where we ask in these articles what statements in these articles do you

claim are false. The response was the claims are not based on any one false statement, but based on the implication.

It's a libel case, and I think what we now have is the plaintiff has conceded that there is no (4) false statements of fact based upon Interrogatory. The burden of proof in a libel case is to show, for the plaintiff, that it is capable of defamatory interpretation. And that it is defamatory. Following that there must be proof that there is a false statement of fact. And as to that false statement of fact, they were published with actual malice by the defendant.

Now, the plaintiffs claim that these articles, as a whole, imply any number of nefarious limitations. For the purpose of today's argument we will concede that. Still, without false statements of fact there isn't a libel claim. An example I can give you, of this, I think, is a report in a newspaper, A shot B. Certainly that could be capable of defamatory interpretation. Murder, any number of things. Perhaps it really was self defense. A would get over, if he brought a libel case, the first hurdle, that it's defamatory. Sure it is. But if it's not false then it doesn't state a claim for libel.

THE COURT: I don't think that that's a comparable example of the case at hand.

MR. STEWART: Okay, I think the Schultz case is a comparable example. That was a Reader's Digest rather long article about the Hoffa disappearance.

THE COURT: I read the case. Don't bother going into it. I just read it.

(5) MR. STEWART: Okay. Can I answer any questions? I'd like to point out, if I may, at the end, part of what plaintiff had said was, "Well, we specified in our Interrogatories to you certain statements, and these are the statements we claim are false."

They have attached an affidavit from Mr. Loricchio and Mr. Francell that says essentially, among other things, "I didn't kill August Brush or Harvey Leach."

Why don't they say, "You said, quote, Joe Loricchio killed Harvey Leach?" Allege that and I can defend that.

THE COURT: I don't think the Hoffa case is on point at all, because in the Hoffa case the judge was making a ruling as a matter of law that plaintiff would not be able to show actual knowledge for reckless disregard. This is not the issue before this court.

MR. STEWART: But you see, your Honor, before you even get to that . . .

THE COURT: The ruling . . .

MR. STEWART: That's right. But to get to it you must find that statement is false. Now, the Reader's Digest article was quite a long article that said . . . that discussed the Hoffa disappearance. And Mr. Schultz said, "that implies that I was involved in a murder, the murder of Jimmy Hoffa."

(6) Fine, we will all agree with that, it certainly said that. Then the court went to the one statement. Plaintiff alleged the statement that was false in there. That statement was this, "Probably the third person that Hoffa thought he was going to meet was Lenny Schultz."

He alleged that was false. Nobody in this case has alleged a particular statement is false. They allege that was false.

THE COURT: In the Schultz case I think there is definitely language that goes against your case. On page five fifty-four the court goes into a long discussion of if words are susceptible of different interpretations it's for the jury to say whether or not they were defamatory. There's a whole long discussion about this.

MR. STEWART: I agree with that, but if I may . . .

THE COURT: And I think this case goes more against you than supports your position. We're not dealing with a question of whether or not . . . um . . . ah . . . whether or not plaintiff will be able to show malice. Which was the only issue before . . .

MR. STEWART: Judge Freeman.

THE COURT: . . . Judge Freeman. And he ruled that they wouldn't.

MR. STEWART: Only two comments on that. (7) First, the language that you refer to that it's for the jury as to whether it's capable of defamatory interpretation, you're absolutely right. In the first instance it's for the trial court to say it could be construed in a defamatory way. We went over that. And Judge Freeman said, "Okay, now, it's for the jury to say, was this interpreted in a defamatory way." Mr. Schultz was involved in the murder of Hoffa.

Yes, there was a jury question. You have to get to the second question, was anything in there false? And was that published with actual malice? To have a determination of actual malice you have to have a determination of falsity.

THE COURT: This whole discussion of different interpretations points out the fact that the tenor of an article can be defamatory rather than the specific statement. And that is what we have been arguing about through all these motions, whether or not . . . and you didn't cite any case that talks about a specific falsity. You are talking about, . . . the . . . that's the whole thing plaintiffs are saying, it's the tenor of the article. That's what Judge Freeman is saying. That is what was said, I think, in that Sanders case. They talk about the tenor of the articles.

MR. STEWART: What Judge Freeman said, is (8) the tenor of these articles is defamatory. Fair enough, it was. He then said, "There is one statement involved here that is an allegation of falsity."

Now, when we look at that and see which was alleged to be false, and we say, "Now, was that statement published with actual malice?" That statement was not published with actual malice.

THE COURT: I don't know where you're getting that. He talks about . . . comment B talks about actual knowledge. That case is up on a motion as to whether or not plaintiffs could show actual malice as a matter of law. And, he said, "No, that's not even before me. You didn't even bring that."

MR. STEWART: The point is, your Honor, to have that claim of actual malice everybody has to concede it's false.

THE COURT: I am saying it could be interpreted. The tenor of the articles could be interpreted as false. Implying that this is a Mafia member. Implying that they are criminals. The whole tenor of it. I think that is what we have been talking abut with all these motions. The tenor of the articles. The whole . . . viewed as a whole. Viewed as a . . .

MR. STEWART: Absolutely, that's what you do to determine if it's capable of defamatory interpretation. (9) The next step in plaintiff's burden of proof is to allege and prove falsity. Now, that is what happened in Leonard Schultz's case. The first thing Judge Freeman did is to say, "Is this capable of defamatory interpretation?"

Reader's Digest took the position that it wasn't. All it said is that Leonard Schultz was going to have lunch with Jimmy Hoffa. Of course. Then he said, "Now, having crossed that burden, the plaintiff's first burden of proof, they have shown it's defamatory, the next burden of proof is is it false?"

The statement then, all the discussion, falsely dealt with unfair comment is what they referred to, while you are looking at that statement . . .

THE COURT: What is a defamatory statement? A defamatory statement is a false statement.

MR. STEWART: No it is not. A defamatory statement is a statement that makes people think less of you.

THE COURT: But truth is a defense, right?

MR. STEWART: No, your Honor, falsity is a requisite for the plaintiff. Whether privileged or non-privileged, as a constitutional matter now plaintiff must [*sic*, prove] falsity.

THE COURT: I agree the plaintiff must prove falsity. We are not at the trial. But you will also (10) agree that truth is a defense. If you have told the truth there is no way plaintiff can recover. You don't have to prove it, but it is a defense, correct?

MR. STEWART: It's a defense in the common-law, but actually, your Honor, the constitutional law has changed that now. It is plaintiff's burden to prove falsity.

THE COURT: There can be no defamation without falsity.

MR. STEWART: There can be defamation when one thinks less of another, which causes people to think less, and to shun that person, he has been defamed.

THE COURT: But if that statement is true then it's not . . .

MR. STEWART: Well, I don't know what to do, what statements plaintiffs claim are false that the Detroit News made about them. I know they think the entire series implied certain things about them, but I don't know what statements I have to defend. I don't know that. And I have tried repeatedly to find that out.

Where in a series of articles of hundreds of thousands of words what factual statement the plaintiffs are complaining about.

THE COURT: Well, let's hear from the plaintiffs.

MR. KENNEY: Your Honor, first of all, we (11) have told Mr. Stewart and his client . . . ah . . . Jeremiah Kenney, your Honor, appearing on behalf of the plaintiffs. On numerous occasions we . . . the tenor of the articles depicting Mr. Francell and Mr. Loricchio as Mafia figures involved in the murders of two individuals.

As having various and sundry criminal connections. And we have supplied affidavits to this court that those are false. Those imputations.

What Mr. Stewart wishes this court to rule is that there must be a sentence or a word in those articles that is in and of itself false. And that is not the law, your Honor, as your Honor has already noticed from the Schultz case. It can be the tenor of the articles that imputes a false image about these individuals to the plaintiff. And it is that which we are suggesting to the court is the entire tenor of the series of articles which are being complained of in our complaint, and amended complaint.

If Mr. Stewart is right that you have to . . . it is not the law that you have to have a particular sentence that says Joseph Loricchio is a Mafia member, to have a defamatory, and an actionable defamatory libel case.

But if you say, for instance, "Joseph Loricchio denies that he is a Mafia member, can you believe it?" It's not a statement, it's a question that certainly imputes that statement to the public. And it is that which the Schultz case and every other case that has talked (12) about, in fact, the defendants have cited, which talked about this. And there is a recent case that we have just located, your Honor, arising out of the State of Florida.

THE COURT: Federal case?

MR. STEWART: It is a Federal case, your Honor. The case is Caldwell versus Cromwell Collier Publishing Company. It is cited at 161 Federal Reporter 2nd, 333. It states, your Honor, it talks about the law of Florida, but they observe, however, no substantial difference between the law of Florida and that of other common-law states.

> "A libel is a compound of written falsity and malicious publication. But the falsity may consist of untrue imputation as well as direct statement."

What these defendants want us to do, and what we have indicated we are unable to do at this particular point in time, is to pick out . . .

THE COURT: Let me ask you something. What are you waiting for here in taking depositions? This trial is up in June?

MR. STEWART: Nothing. We're starting. Can I make a point, Judge? The defendants . . . the plaintiffs can depose everybody at the Detroit News from now until kingdom come, and it's not going to tell them what they (13) claim is false. There are statements in there they claim are false. I'm not over here today to argue the . . .

THE COURT: I know you're not.

MR. STEWART: I just want to know what I have to defend.

THE COURT: The Sanders case also, 331 Michigan Reports. That talks about viewing the whole thing, everything as a whole. And I'm sorry, but I don't agree with your interpretation. I agree with that Florida case. I agree with the Sanders case. I agree with the Schultz case. And they talk about viewing the whole series as a whole.

MR. STEWART: I don't argue with you for a minute. To determine whether it's defamatory or not. The next step is, is it false? That is what Judge Freeman said in Schultz. That's all that happened in Sanders.

THE COURT: You show me in Schultz where Judge Freeman said that? He talks about falsity. But in none of these cases do they talk about specific statements of falsity. Now, you show me in that Schultz case . . . . And here it is right here, where that is.

MR. STEWART: Sure. The reason is, in every case we've had cited by the plaintiff, including the Leonard Schultz case, here, the plaintiff is dealing with a large newspaper article, or a Reader's Digest article. He (14) complained about a particular statement that was false. The Jimmy Hoffa story was a long . . . .

THE COURT: What about that Florida case?

MR. STEWART: I've never read it, your Honor, I'm sorry.

THE COURT: I'm sorry, I don't agree with you. I have not read that case either. But from the cases I have read I don't think that your interpretation is correct.

MR. STEWART: You see, the statement in Leonard Schultz's case was a very long article, and the statement is . . . .

THE COURT: There's only one mention about Leonard Schultz, and that was Jimmy Hoffa was supposed to go meet him. And the implication was that he was involved in the killing of Jimmy Hoffa.

MR. STEWART: Yes, and that was the statement they looked at, that statement.

THE COURT: Right.

MR. STEWART: All the cases we've dealt with are . . . isolate[*d*] statements that are made.

THE COURT: The judge in that case said that that was capable of a defamatory interpretation.

MR. STEWART: I agree. And I agree today.

THE COURT: Now, you show me, you show me (15) in that case where they are talking about proving a specific falsity there. You show me in that case where it supports what you're saying, because I read the case, and I read it carefully. But I would be happy to look at it.

MR. STEWART: I'll show you. What happened is they were dealing with an article that was about this long (indicating). As long as this case, that's what Mr. Schultz complained about. He said, "Reading that as a whole, talking about Provenzano, all these people involved in the Hoffa murder . . ."

THE COURT: Well, I don't think it's any different than a series of articles.

MR. STEWART: I will say to you today, for the purpose of this argument I agree. For the purpose of this argu-

ment it's capable of defamatory interpretation. Let's assume we all agree. The next step is what is false? Is that false?

THE COURT: The tenor of the article is false, and that is all I can say.

MR. KENNEY: Your Honor . . .

THE COURT: I don't want to hear any more argument on it, because we're going over the same ground. I think that plaintiffs are alleging that the whole tenor of the article left certain impressions that they are claiming are false. To-wit: Mafia . . . .

(16) MR. STEWART: That's the upshot of this, your Honor. The upshot may be this, we will be faced with a libel case, perhaps, and the ruling is essentially this, you can have a case where there is a series of absolutely true statements that nobody disagrees with, and that would support an action for libel, and this paper would be subjected to judgment.

That is not the law of libel.

MR. KENNEY: That is not your Honor's ruling. I will present an Order.

THE COURT: I think I made my ruling clear. And I don't agree with your interpretation. I don't think that the cases cited support your argument either.

MR. STEWART: Thank you, your Honor.

MR. KENNEY: Thank you.

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFFS' LIBEL CLAIMS

(State of Michigan — Circuit Court — County of Wayne)

(Dated April 6, 1982)

(JOSEPH JUDEUS LOCRICCHIO and GARY FRANCELL, Plaintiffs, vs. THE EVENING NEWS ASSOCIATION, INC., a Michigan Corporation, PETE WALDMEIR, BILL GILES, JEFF LADERMAN, MICHAEL F. WENDLAND, JEAN GADOMSKI, RICHARD WILLING, ROBERT ANKENY, and JIM GRAHAM, Jointly and Severally, Defendants — NO: 80-012-145 CZ; HON. SUSAN D. BORMAN)

At a session of said Court, held in the County of Wayne, State of Michigan on April 2, 1982 [*TYPEWRITTEN*]
APR 6 1982 [*STAMPED*].

PRESENT: HONORABLE SUSAN D. BORMAN,
Circuit Judge.

Upon the reading and filing of defendants' Motion for Summary Judgment as to Plaintiffs' Libel Claims, and the Court being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that defendants' Motion for Summary Judgment as to Plaintiffs' Libel Claims is denied.

/s/ SUSAN D. BORMAN
CIRCUIT JUDGE

Approved as to form:

By: JEREMIAH J. KENNEY (P24810)
Attorney for Plaintiffs
2000 Buhl Building
Detroit, Michigan 38226 [*sic*]

By: JAMES E. STEWART (P23254)
Attorney for Defendants
1881 First National Bldg.
Detroit, Michigan 48226

(*Certification Omitted*)

ORDER [*DENYING CERTIFICATION OF QUESTION FOR APPEAL*]

(State of Michigan — Circuit Court — County of Wayne)

(Dated May 24, 1982)

(JOSEPH JUDEUS LOCRICCHIO and Gary Francell, Plaintiffs, vs. THE EVENING NEWS ASSOCIATION, INC., a Michigan Corporation, PETE WALDMEIR, BILL GILES, JEFF LADERMAN, MICHAEL F. WENDLAND, JEAN GADOMSKI, RICHARD WILLING, ROBERT ANKENY, and JIM GRAHAM, Jointly and Severally, Defendants — NO: 80 012145-CZ; HON. SUSAN D. BORMAN)

At a session of said Court, held in the City-County Building, City of Detroit, County of Wayne, State of Michigan on May 24, 1982 [*HANDWRITTEN*]
MAY 20 1982 [*STAMPED*].

PRESENT: HON. SUSAN D. BORMAN, CIRCUIT JUDGE.

Upon the reading and filing of defendants', THE EVENING NEWS ASSOCIATION, INC., et al., Motion for Settlement of Concise Statement of Facts and Proceedings and to Certify Question for Appeal, and upon reading and filing of plaintiffs' objections thereto, the parties having appeared through their respective counsel in open court, and the court being fully advised in the premises:

IT IS HEREBY ORDERED that defendants' Motion to Certify Question for Appeal is denied.

/s/ HONORABLE SUSAN D. BORMAN, Circuit Court Judge

Approved as to form
BY: /s/ JEREMIAH J. KENNEY (P24810), Attorney for Plaintiffs, 2000 Buhl Building, Detroit, Michigan 48226;
By: /s/ JAMES E. STEWART (P23254), Attorney for Defendants, 1881 First National Building, Detroit, Michigan 48226.

(*Certification Omitted*)

ORDER [*GRANTING INTERLOCUTORY APPLICATION FOR LEAVE TO APPEAL*]

(State of Michigan — Court of Appeals)

(Certified August 5, 1982)

(JOSEPH JUDEUS LOCRICCHIO, and GARY FRANCELL, Plaintiffs-Appellees, v THE EVENING NEWS ASSOCIATION, INC., a Michigan corporation, PETE WALDMIER [*sic*], BILL GILES, JEFF LADERMAN, MICHAEL F. WENDLAND, JEAN GADOMSKI, RICHARD WILLING, ROBERT ANKENY, and JIM GRAHAM, Jointly and Severally, Defendants-Appellants – No. 64729; L.C. No. 80-012-415-CZ)

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Lansing, on the 3rd day of August in the year of our Lord one thousand nine hundred and eighty-two.

Present the Honorable: Robert J. Danhof, C.J., Presiding Judge; William R. Beasley, Walter P. Cynar, Judges.

In this cause an application for leave to appeal and motion for immediate consideration are filed by defendants-appellants, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED, that the motion for immediate consideration be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the application be, and the same GRANTED on condition that all acts required by subrules 803.2 and 803.5 be performed within 20 days after the date of the Clerk's certification of this order.

(*Certification Omitted*)

OPINION

(State of Michigan — Court of Appeals)

(Dated August 24, 1983)

(JOSEPH JUDEUS LOCRICCHIO and GARY FRANCELL, Plaintiffs-Appellees, v EVENING NEWS ASSOCIATION, INC., PETE WALDMEIR, BILL GILES, JEFF LADERMAN, MICHAEL F. WENDLAND, JEAN GADOMSKI, RICHARD WILLING, and ROBERT ANKENY, Defendants-Appellants – No. 64729)

BEFORE: V. J. Brennan, P.J.,
M. H. Wahls and M. Dodge*, JJ.

PER CURIAM

This lawsuit arises out of a series of eleven allegedly defamatory articles published in the Detroit News between April 27, 1977 and April 25, 1979 concerning the activities of plaintiffs Locricchio and Francell with regard to their development and operation of the Pine Knob entertainment complex. Defendant, the Evening News Association, Inc., publishes the Detroit News, defendant Giles is its editor and Vice-President, and the remaining defendants are reporters, staff writers, and columnists for the Detroit News.

On April 3, 1980, plaintiffs filed a ten-count complaint, the first three counts of which allege a cause of action for libel based on the news articles. The articles, consisting of in excess of 10,000 words, accompanied the complaint. On October 7, 1981, defendants filed interrogatories requesting, among other things, that plaintiffs identify with particularity each and every statement claimed to be defamatory, and each and every statement claimed to contain false statements of fact in each publication relied upon by plaintiffs in sup-

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*** Circuit Judge, sitting on the Court of Appeals by assignment.**

port of their libel claims. Plaintiffs responded in part as follows:

> "[*T*]*he defamation allegations contained in said Complaint are not necessarily based on a false statement(s) in any one particular article, but rather, that the entire series of articles, in their entirety, injured the reputations of plaintiffs as the same represented a false portrayal, implication, imputation and/or insinuation that plaintiffs, among other things, are or were members and/or associates of an organized criminal society, otherwise known as the 'Mafia'; individuals of low moral and character;* that the plaintiffs knowingly and purposely engaged, participated and/or authorized financial agreements and/or arrangements of a questionable nature and/or legality and that the plaintiffs' names and reputations were unjustifiably associated with other criminal conduct and/or activity of a reprehensible nature.
>
> * * *
>
> "As the article or articles, and the information contained therein, forms the basis for plaintiffs' libel allegations, *the defamatory impact of the same cannot be dissected and articulated into solitary phrases or sentences. Rather, the full portrayal, implication, imputation and/or insinuation can only be ascertained by viewing the articles, as they are presently known to plaintiffs, in conjunction with each other.* Viewing the articles in the aforesaid fashion, the defamatory nature of the same becomes self-evident." (Emphasis added.)

Based on these answers, defendants moved for summary judgment, GCR 1963 117.2(3). The trial court denied the motion. Defendants take this interlocutory appeal by leave granted.

Defendants assert on appeal, as they did in support of their motion for summary judgment, that no action for libel exists here because plaintiffs admit that their allegations of defamation are not based on a specific false statement in any particular article. Defendants contend that plaintiffs' allegations that the entire series of articles falsely portrayed plaintiffs as members or associates of an organized criminal society, known as the "Mafia", cannot support an action for libel.

We disagree. "'To test its libelous quality, a publication is to be considered as a whole, including the character of the display of its headlines when the article is published in a newspaper, and the language employed therein.'" *Sanders* v *Evening News Association*, 313 Mich 334, 340; 21 NW2d 152 (1946). The pleadings, including plaintiffs' answers to the interrogatories, raise a genuine issue of material fact as to whether the specified articles, read as a whole, carry a defamatory insinuation or inference that plaintiffs are associated with organized crime. Insinuation, imputation or inference may be as defamatory as a direct, unveiled assertion. See *Caldwell* v. *Crowell Collier Publishing Co*, 161 F2d 333, 335-336 (CA 5); *cert den*, 332 US 776 (1947), *Memphis Publishing Co* v *Nichols*, 569 SW2d 412, 419-420 (Tenn 1978), 50 Am Jur 2d, Libel and Slander, § 13, pp 528-529, Prosser, *Torts*, (4th ed, 1971), § 111.

Plaintiffs did not concede the truth of the alleged insinuation. They specifically state in their response to interrogatories that the entire series of articles represented "a *false* portrayal, implication, imputation and/or insinuation" that plaintiffs are or were members and/or associates of an organized criminal society, otherwise known as the Mafia.

The pleadings have given rise to a genuine issue of material fact which is to be left to the trier of facts and cannot be disposed of by summary judgment.

The trial court properly denied defendant's motion for summary judgment.

Affirmed.

/s/ V. J. Brennan
/s/ M. H. Wahls
/s/ M. Dodge

ORDER [*DENYING REHEARING*]

(State of Michigan — Court of Appeals)

(Certified October 24, 1983)

(JOSEPH JUDEUS LOCRICCHIO And GARY FRANCELL, Plaintiffs-Appellees, v EVENING NEWS ASSOCIATION, INC., PETE WALDMEIR, BILL GILES, JEFF LADERMAN, MICHAEL F. WENDLAND, JEAN GADOMSKI, RICHARD WILLING, And ROBERT ANKENY, Defendants-Appellants – Docket # 64729; L.C. # 80 012 415 CZ)

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Detroit, on the Seventeenth day of October in the year of our Lord one thousand nine hundred and eighty-three.

Present the Honorable: VINCENT J. BRENNAN, Presiding Judge; MYRON H. WAHLS, MICHAEL E. DODGE, Judges.

In this cause an application for rehearing having been filed by defendants-appellants, and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the application for rehearing be, and the same is hereby DENIED for lack of merit in the grounds presented.

(*Certification Omitted*)

ORDER [*DENYING LEAVE TO APPEAL*]

(State of Michigan — Supreme Court)

(Certified April 27, 1984)

(JOSEPH JUDEUS LOCRICCHIO and GARY FRANCELL, Plaintiffs-Appellees, v EVENING NEWS ASSOCIATION, INC., PETE WALDMEIR, BILL GILES, JEFF LADERMAN, MICHAEL F. WENDLAND, JEAN GADOMSKI, RICHARD WILING [*sic*], ROBERT ANEKY and JIM GRAHAM, jointly and severally, Defendants-Appellants — SC: 72978; COA: 64729; LC: 80-012-145 [*sic*, 415] -CZ)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 27th day of April in the year of our Lord one thousand nine hundred and eighty-four.

Present the Honorable: G. MENNEN WILLIAMS, Chief Justice; THOMAS GILES KAVANAGH, CHARLES L. LEVIN, JAMES L. RYAN, JAMES H. BRICKLEY, MICHAEL F. CAVANAGH, PATRICIA J. BOYLE, Associate Justices.

On order of the Court, the motion for extension of time to file answer is considered, and it is GRANTED.

The application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that the question presented should now be reviewed by this Court.

(*Certification Omitted*)

ORDER [*DENYING RECONSIDERATION OF DENIAL OF LEAVE TO APPEAL*]

(State of Michigan — Supreme Court)

(Certified June 29, 1984)

(JOSEPH JUDEUS LOCRICCHIO and GARY FRANCELL, Plaintiffs-Appellees, v EVENING NEWS ASSOCIATION, INC., PETE WALDMEIR, BILL GILES, JEFF LADERMAN, MICHAEL F. WENDLAND, JEAN GADOMSKI, RICHARD WILLING, ROBERT ANEKY, and JIM GRAHAM, jointly and severally, Defendants-Appellants — SC: 72978; COA: 64729; LC: 80-012-145 [*sic*, 415] -CZ)

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 29th day of June in the year of our Lord one thousand nine hundred and eighty-four.

Present the Honorable: G. MENNEN WILLIAMS, Chief Justice; THOMAS GILES KAVANAGH, CHARLES L. LEVIN, JAMES L. RYAN, JAMES H. BRICKLEY, MICHAEL F. CAVANAGH, PATRICIA J. BOYLE, Associate Justices.

On order of the Court, the motion by defendants-appellants for reconsideration of this Court's order of April 27, 1984, is considered, and the motion is DENIED, because it does not appear that the order was entered erroneously.

(*Certification Omitted*)

NOTIFICATION DENYING WRIT OF CERTIORARI

(United States Supreme Court)

(Dated November 13, 1984)

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

Mr. Jeremiah J. Kenney
Kitch, Suhrheinrich, Saurbier
2000 Buhl Building
Detroit, MI 48226

November 13, 1984

RE: *The Evening News Association, et al.*, v. *Joseph Judeus Locricchio and Gary Francell* — No. 84-437

Dear Mr. Kenney:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

/s/ Alexander L. Stevas,
Clerk

OPINION OF THE COURT [*GRANTING DIRECTED VERDICT*]

(State of Michigan — Circuit Court — County of Wayne)

(*Undated; Issued December 11, 1986*)

(JOSEPH LOCRICCHIO and GARY FRANCELL, Plaintiffs, versus THE EVENING NEWS ASSOCIATION, Inc., PETE WALDMEIR, BILL GILES, MICHAEL WENDLAND, JEAN GADOMSKI, et al, Defendants — Case Number 80 012 415 CZ)

BEFORE THE HONORABLE MICHAEL J. CONNOR

The basis of plaintiffs' defamation suit were eleven articles published between April 28, 1978 and April 25, 1979 which concerned the activities of Joseph Locricchio and his partner Gary Francell. Included in these articles was a four-part series collectively entitled "The Pine Knob Story" which was published in the Detroit News for four consecutive Sundays, commencing Sunday, April 22, 1979.

Plaintiffs claimed that viewed as a whole, the articles by innuendo, insinuation, implication and inference falsely portrayed plaintiffs as members of the Mafia; linked them with two unsolved murders; and suggested they were involved in a series of illegal financial arrangements.

Where allegedly defamatory speech is of public concern, the First Amendment demands and Michigan law requires that the plaintiff, whether public official, public figure, or private individual, prove the statements at issue to be false.[1] *Philadelphia Newspapers Inc.* v *Hepps*, 54 Law Week 4373 (4/21/86) *Ledl* v *Quik Pik Stores* 133 Mich. App. 583 (1984) SJI 2d 118.05; 118.07

The Court holds the plaintiffs have failed to prove the publications at issue contained significantly false facts, and a verdict must be directed for the defendant. In the

case at bar the plaintiffs urge the Court to disregard the underlying facts and suggest it is the "inferences" which may be drawn from the articles which comprise the false statements constituting the defamation.

This argument is contrary to both Michigan law and Federal law as well.

Insinuation, imputation, or inference may be as defamatory as a direct unveiled assertion: *Simons* v *Bernham*, 102 M 189, (1884) *Caldwell* v *Crowell Collier Publishing Company*, 161 F2d 333, 335-336 (Ca5); *cert. den* 332 U.S. 776 (1947). *Memphis Publishing Company* v *Nichols*, 569 SW2d 412, 419-420 (Tenn. 1973; 50 Am Jur 2d, libel and slander, 13, pages 528-529; *Prosser, Torts* (4th Edition, 1971), 111. *Schultz* v *Readers Digest*, 468 F. Supp SS1 (1979). *Locricchio* v *Evening News Association*, Docket No. 64729. However, liability cannot be imposed for journalistic inferences allegedly arising from the reporting of true facts about matters of public interest and concern. The plaintiff must prove the false impression arises from untrue, or undisclosed facts. *Sanders* v *Evening News Association*, 313 Mich 334 (1946) *Strada* v *Connecticut Newspapers*, 477 A 2d 1005 (Conn. 1984); *Herbert* v *Lando*, 781 F. 2d 298 (2nd Cir 1986).

In *Sanders* v *Evening News Association* 313 Mich 334 (1946), the plaintiff was a former judge who complained about Detroit News reports that he had held Court in the Bethune Police Station at night by banging his gavel on the desk and shouting "Court's in Session". The plaintiff did not dispute any fact in the articles as false but disputed the implication that he was acting improperly. Plaintiff stated his claim as follows:

> [Defendant] by the publication meant to convey that the plaintiff was guilty of misfeasance, malfeasance and corrupt practices in the office

> of judge of the common pleas court, and thereby "maliciously to injure the plaintiff, in his good name, fame and credit and to bring him to public scorn, mockery, ridicule and contempt. (at page 339)

Despite plaintiff's attempt to couch his falsity requirement in innuendo or implication, the Court affirmed the lower court's summary judgement. The court reviewed the articles as a whole, including the character and display of headlines, and stated in part:

> Our review of this record brings the conclusion that under plaintiff's own pleadings he is not entitled to recover in consequence of the publication of July 27, 1942. This is because in his amended declaration plaintiff admits the truth of the July 27th publication in so far as it could possibly tend to support an action for libel. Since the publication was true, it was not libelous. *Sullings* v *Shakespears*, 467 Mich 408 (41 AM Rep 166) — (at page 339-340)

While numerous federal cases have "struggled . . . to define the proper accomodation between the law of defamation and the freedoms of speech and press protected by the First Amendment"[3] (and counsel seem to have cited most of them), one recent decision which canvassed the entire area of inference and innuendo is particularly enlightening.

In *Strada* v *Connecticut Newspapers* 477 A 2d 1005 (Conn 1984) the plaintiff brought a libel action claiming injury by innuendo from news reports that detailed Plaintiff's relationship with an organized crime figure. The trial court, in a finding supported by the appellate court, concluded that each claimed falsehood of fact or quotation was either true or substantially true and lia-

bility could not be imposed for innuendo allegedly arising from the reporting of true facts.[4]

> But in the instant case, the Plaintiff seeks to recover from a publication where all the underlying and stated facts have been proved to be true, or substantially true, claiming that the "slant" of the article gives rise to allegedly false and defamatory implications. Unlike *Memphis Publishing Co* v *Nichols, supra,* the Plaintiff here has not alleged, nor has our examination of the record disclosed, the existence of additional material facts which, if reported, would have changed the tone of the article. In the absence of such undisclosed facts, first amendment considerations dictate that an article concerning a public figure composed of true or substantially true statements is not defamatory regardless of the tone or innuendo evident. (at page 1010)

> When any inference or innuendo does not arise from the omission of material facts, but rather from the editorial choice of layout, the Plaintiff may not recover for libel by innuendo. The media would be unduly burdened if, in addition to reporting facts about public officers and public affairs correctly, it had to be vigilant for any possibly defamatory implication arising from the report of those true facts. (at page 1012)

In ruling on the motion for directed verdict the court has accepted the facts as submitted by the plaintiff (see Appendix B), and has viewed the evidence in the light most favorable to the plaintiff. The court finds the plaintiff has failed to establish a prima facie case having failed to demonstrate the underlying facts and circumstance were false. (see Appendix C).

Defense motion for directed verdict is granted.

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[1] When the alleged defamation involved a 'public figure' or a matter of 'public interest' requiring application of the 'actual malice' test the only issue on appeal has traditionally been whether the evidence was sufficient to demonstrate the existence of a genuine issue of fact on the question of malice. Thus, the bulk of appellate decisions deal with the issue of fault rather than falsity, and the sole question was whether the material was *known* to be false or was published with reckless disregard of whether it was true or false. For example see: *Schultz* v *Newsweek, Inc.* 668 F. 2d 911 (1982), *Bartino* v *Horsemen's Benevolent and Protective Association,* 592 F. Supp. 1526 (1984).

When necessary, however, the courts have made it abundantly clear the plaintiff must bear the burden of showing falsity, as well as fault, before recovering damages.

In the recent case of *Philadelphia Newspapers Inc.* v *Hepps* 54 law week 4373 (4/21/86) the court stated succinctly:

> Our opinions to date have chiefly treated the necessary showings of fault rather than of falsity. Nonetheless, as one might expect given the language of the Court in New York Times, see supra, at 5, a public-figure plaintiff must show the falsity of the statements at issue in order to prevail on a suit for defamation. See *Garrison* v *Louisiana,* 379 U.S. 64, 74 (1964) (reading New York Times for the proposition that "a public official [is] allowed the civil [defamation] remedy only if he establishes that the utterance was

> false"). See also *Herbert* v *Lando*, 441 U.S. 153, 176 (1979) ("the plaintiff must focus on the editorial process and prove a false publication attended by some degree of culpability").

Certainly, it must be conceded the court appreciated they had erected a formidable barrier which severely restricted plaintiffs opportunity to prevail on the merits. The four dissenting justices in *Hepps* resisted extending this substantial burden to private individuals stating:

> To appreciate the thrust of the Court's holding, we must assume that a private-figure libel plaintiff can prove that a story about him was published with "actual malice" — that is, without the publisher caring in the slightest whether it was false or not. Indeed, in order to comprehend the full ramifications of today's decision, we should assume that the publisher knew that it would be impossible for a court to verify or discredit the story and that it was published for no other purpose than to destroy the reputation of the plaintiff. Even if the plaintiff has overwhelming proof of malice — in both the common law sense and as the term was used in *New York Times Co.* v *Sullivan* — the Court today seems to believe that the character assassin has a constitutional license to defame.

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[2] Considering the kaleidoscopic changes wrought in libel law since the landmark decisions of *Sullivan* and *Gertz* the temptation might be to dismiss *Sanders* as yesterdays news. However, the principles remain consistent. In the most recent expression of Michigan law, *Doughterty* v *Capital Cities Communications, Inc.*, No. 81-73981, U.S. District Court, Eastern District of Michigan, (slip opinion released February 6, 1986), the

Court disposed of a similar claim of defamation by innuendo, stating:

> An action for defamation does not lie unless, among other factors, the alleged defamatory statements are false and are of and concerning the plaintiff. *Hall* v *Citizens Insurance Company of America*, 141 Mich. App. 676, 685 (1985); *Postill* v *Booth Newspapers, Inc.*, 118 Mich. App. 608, 618 (1982). Thus, where there is no question of material fact presented as to the truth of the statements made by the broadcast reporters, or where the reports were not "of and concerning plaintiff", no defamation action lies.
>
> Here, plaintiff has been unable to point to a single specific statement that was "of and concerning him", defamatory, or untrue. Although plaintiff painstakingly presents his version of the story behind each of the broadcasts in his appendix A to his response to defendants' motion, he does not succeed in uncovering any significant statement about him that is false.
>
> Plaintiff's stronger argument is that, although each of the statements, taken alone, is true, it was the overall tone of the broadcasts that is defamatory, and that this is the result of innuendo from that which was *not* stated in the broadcasts.
>
> Taking plaintiff's argument as true for the purpose of this motion, it raises the question of the applicability of the Michigan common law qualified privilege to report on matters in the public interest, which insulates a defendant from liability absent a showing of actual malice.
>
> In analyzing plaintiff's contentions, accepting his pleadings and arguments in the most favor-

able light, it is impossible to discern any false information in the broadcasts. Each statement made had a factual basis, and where they were not factual statements, as with the potential tactical advantage in knowing the judge's predisposition in a matter, they were statements of opinion that were not actionable as defamation. On this ground alone, this action could be dismissed. Furthermore, however, even if plaintiff could raise some question as to truthfulness based on innuendo and omission from these reports, the Court finds that summary judgment can be based on Michigan's qualified privilege to report on matters in the public interest, as plaintiff cannot raise any issue of material fact on the question of defendants' actual malice. (Slip Opinion, pp 6-7, 23)

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3 *Gertz* v *Robert Welch, Inc.*, 418 U.S. 323, 325 (1974).

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4 In support of this conclusion, the court offered an extensive review of other decisions considering alleged innuendo based on true facts.

> Recovery was denied in *Loeb* v *News Times Communications Corporation*, 497 F. Supp. 85 (S.D.N.Y. 1980), where the court specifically found that "[t]he authors' clear intent was to portray an overwhelmingly negative picture of Loeb by presenting purported examples of his ridiculous idiosyncrasies and prejudices, shady political maneuverings, and dishonest reporting practices." *Id.*, 88-89. In spite of the "suggestive context," the article was constitutionally protected because the "Defendants have reported the facts accurately and carefully, avoiding the defamatory

conclusion which Loeb claims they intended the reader to draw." *Id.* 91.

In *Mihalik* v *Duprey,* 11 Mass. App. 602, 417 N.E. 2d 1238 (1981), each individual statement published in a "riddle" about a public figure was true. The court held that recovery could not be had "merely because in the aggregate they have an insinuating overtone." *Id.*

In a Louisiana case the public official Plaintiff admitted "there was nothing factually incorrect in the article. However, the way people looked at the thing he was accused of misusing state funds for personal benefit." *Schaefer* v *Lynch,* 406 So. 2d 185, 188 (La. 1981). The court there held that "truthful statements which carry a defamatory implication can be actionable. However, that is only true in the case of private citizens and private affairs. Even false statements about public officials are constitutionally protected unless known to be false or printed with a reckless disregard for the truth. *New York Times Co* v *Sullivan,* [376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 86 (1964)]. It surely follows that all truthful statements are also constitutionally protected. Even though a false implication may be drawn by the public, there is no redress for its servant. Where public officers and public affairs are concerned, there can be no libel by innuendo." *Id.*

Still another court held that: "Unless he can successfully identify particular false statements that, taken in context, create the impression he is a "throwback to the middle ages," [the Plaintiff doctor] cannot complain." *Rinsley* v *Brandt,* 700 F. 2d 1304, 1310 (10th Cir. 1983). A publisher cannot be responsible 2 [*sic*] for every strained interpre-

tation that a Plaintiff might attribute to its words. See *Lewis* v *Time, Inc.*, 210 F. 2d 549, 553-56 (9th Cir. 1983); *Cibenko* v *Worth Publishers, Inc.*, 510 F. Supp. 761, 765 (D.N.J. 1981).

APPENDIX A

TRIAL SYNOPSIS

The following chronology outlines certain pertinent dates regarding the trial of this matter, including the length, complex nature, and precise handling of this trial by counsel and the Court:

July 9, 1985	Case assigned to the Honorable Sharon Tevis Finch for trial; Judge Finch recused herself.
July 10, 1985	Case assigned to the Honorable Michael J. Connor for trial; counsel met with the Court in chambers to discuss matters relating to the case; defendants served their third and fourth motions for summary disposition, the third motion addressed plaintiffs' libel claims and the fourth motion addressed plaintiffs' other claims; the Court gave plaintiffs until July 15, 1985, to respond.
July 15, 1985	Defendants' motion for summary disposition on "public figure", "public interest", and "actual malice" arguments heard.
July 16, 1985	The Court delivered its oral opinion from the bench holding that plaintiffs were not public figures or limited purpose public figures, that the business and financial affairs of the

	entities operating the Pine Knob were a matter of *public interest,* and that plaintiffs would be required to prove that defendants acted with actual malice at trial.
July 17, 1985	Jury selection commenced. Jury sworn.
July 18, 1985	Opening statements were given after miscellaneous matters were disposed of including the voluntary dismissal of some defendants and certain counts.
July 22, 1985	Plaintiffs' case in chief commenced.
August 21, 1985	Plaintiffs' case in chief concluded, defendants' move for a directed verdict; the Court reserved its ruling on the motion until the close of all proofs.
August 21, 1985	Defendants' case in chief commenced.
August 26, 1985	Defendants' case in chief concluded; plaintiffs' rebuttal case commenced and concluded; defendants' renewed their motion for directed verdict; plaintiffs serve their brief in opposition to defendants' motion for directed verdict.
August 27, 1985	Additional arguments on defendants' motion for directed verdict; directed verdicts granted by the Court as to defendants Waldmeir and Giles on plaintiffs' libel claims; directed verdict granted on plaintiffs' false light invasion of privacy claims as dupli-

	cative of plaintiffs' defamation claims; directed verdict granted on plaintiffs' intentional infliction of emotional distress claims as defendants' conduct not outrageous; the Court reserved its ruling on the remaining libel claims until after the jury reached its verdict.
August 28, 1985	Further argument and discussion among counsel and the Court regarding jury instructions.
August 29, 1985	Preliminary jury instructions given by the Court followed by closing arguments of counsel for the parties.
September 3, 1985	Jury instructions read to jury; the Court submitted the case to the jury and deliberations commenced.
September 4, 1985	Jury returned with verdicts for each plaintiff; special verdict form for plaintiff Locricchio found no publication; special verdict form for plaintiff Francell found publication, material falsity and a tendency to harm Francell's reputation, publication of and concerning Francell, actual malice, and actual damages in the amount of $3 million; the jury did not find "bad faith or ill will".

APPENDIX B

1. *Sunday, April 22, 1979: "News notes: Two News Reporters with Two News Styles."*

On Sunday, April 22, 1979, defendants published two articles with respect to plaintiffs. One appeared on Page

4A of *The Detroit News*, under the title "News Notes: Two News reporters with two news styles". The article, written by Bill Giles, contrasted the personal and reportorial styles of Michael F. Wendland and Jean Gadomski who, according to the text of the article, "produced the series on Pine Knob, [and] spend [*sic*] two months reporting and writing the story". Insofar as the article relates to plaintiffs, it may be fairly construed to state, in essence, that the developers of Pine Knob (plaintiffs) have risen rapidly to success; that their success is associated with involvement in organized crime, questionable and/or illegal financial transactions, investigations by the FBI, and two unsolved murders; that the whole story respecting this involvement remains to be told; and that defendants recognized the story as one requiring thorough investigation and full, fair and factual reporting. The article then described Wendland as one of the reporters involved in investigating corruption and organized crime in Arizona following the murder of an Arizona newsman and suggests that the skills required in investigating "the Arizona project" and the "Pine Knob story" are the same or similar. The article suggests that the series of articles by Wendland and Gadomski are the result of an "investigation" of plaintiffs and Pine Knob, including the "involvements" mentioned, that at least one of the reporters involved in the investigation has previous experience in investigating organized crime and corruption, and that this series will set out the results of the investigation in a full, fair and factual manner. This article thus provides the "focus" for the articles to follow.

2. *Sunday, April 22, 1979: "The Pine Knob Story: How two friends and hustle created a big resort, millions in debt and a question: 'Is it Mafia?'"*

The second of the Sunday, April 22, 1979, articles, Part One of "the Pine Knob Story", appeared on the front

page and pages 6A and 7A of *The Detroit News*. The article, written by Wendland and Gadomski, was headed "The Pine Knob Story: How two friends and hustle created a big resort, millions in debt and a question: 'Is it Mafia?'". Under an aerial photograph of a portion of Pine Knob, an inset contained a map of the area near Clarkston, Michigan, where Pine Knob is located, and the italicized subhead:

> In the last eight years Pine Knob, in Oakland County, has developed from a losing ski resort into one of the nation's foremost entertainments complexes, worth millions. During these years the persistent question in Michigan and elsewhere has been "Is it Mafia?" This is the first of four articles resulting from two-months' examination by The News of Pine Knob's finances and ownership.

The words "Mafia", "mob", "organized crime", "Mafiosi", and "Sicilian heritage" are scattered throughout Part One — a total of 13 such references — which describes plaintiffs as "wear[ing] silk shirts, driv[ing] expensive Mercedeses and Corvettes and fly[ing] about the country in their own two-engine airplane", adding that "[b]oth come from middle-class Detroit families and neither went to college".

In a cliff-hanger paragraph bridging pages 1A and 6A, prompting the reader to turn the page, the article states:

> Angered by what they claim is harassment from the FBI, the Internal Revenue Service and state and local law enforcers, they nevertheless say they can see why "people think we are mob". For, tangled in the confusing, often incredible story of how they made Pine Knob, are:

Continued on Page 6A.

Continued from Page 1A.

* Two unsolved murders. Though separate, the killings share common elements that lead to some of the same people who figured in Pine Knob's development.

* A so-called "money wash" in which a Toronto firm linked to an associate of Meyer Lanski, the Mafia's key money man, hid the source of a $200,000 Pine Knob loan.

* A $4 million dollar cost overrun by Locricchio and Francell in the building of a glittering theater for Las Vegas' Aladdin Hotel and Casino.

* Several investors associated with organized crime who either lent or helped Locricchio and Francell raise large sums of money.

3. *Monday, April 23, 1979: "The Pine Knob Story: How Loan got 'Washed.'"*

Part Two of the Pine Knob Story appeared on the front page and page 4A of the April 23, 1979, edition of *The Detroit News*. The article was written by Wendland and Gadomski and was entitled "The Pine Knob Story: How Loan Got 'Washed.'" Directly under this headline is a photograph of a Lincoln Continental with the trunk open. The photograph is captioned: "Harvey Leach's car was found with his body in the trunk". Directly under this caption is an inset containing the boldfaced subhead:

> In the last eight years Pine Knob, in Oakland County, has developed from a losing ski resort into one of the nation's foremost entertainment complexes, worth millions. During these years, the persistent question in Michigan and else-

where has been, "Is it Mafia?" This is the second of four articles resulting from a two-months' examination by The News of Pine Knob's finances and ownership.

The main thrust of Part Two is conveyed in the following excerpt:

> Pine Knob owners Joseph J. Locricchio and Gary Francell agree that their business connections, when diagramed on a blackboard, make them appear to be organized crime figures".
>
> Inserted in that diagram are the names of two murder victims, the names of persons involved in unusual financial deals and the names of associates identified with the Mafia by federal agents.
>
> Locricchio says that such a diagram, drawn by police agencies, as well as his Sicilian heritage, has unfairly put the sign of the Mafia on Pine Knob.
>
> * * *
>
> The first of the two murders on the law enforcement diagram occurred on October 27, 1972, when Agnes Brush, who worked as the bookkeeper of a small auto supply firm, was stabbed to death. Three months earlier Ms. Brush's boss had secretly made a $200,000 loan to Locricchio and Francell — a loan "desperately" needed by the partners to stave off foreclosure on outstanding debts. To hide its source, the money was "washed" or routed through a Toronto money broker with mob associations.
>
> The second murder took place 17 months later, on March 16, 1974. The victim was Southfield furniture magnate Harvey Leach, whose nearly

> decapitated body was found in the trunk of his luxury automobile.
>
> Leach had been working with Locricchio and Francell on construction plans for a chain of furniture stores, called Joshua Doore. Loans negotiated through the same Toronto money broker financed the building of those stores.
>
> Locricchio and Francell say they know nothing about either killing, and insist that it is coincidental that some of the same people were involved in the loans to Leach and Pine Knob. A score of police agencies have investigated the murders and have not provided otherwise.

The balance of the article provides further details of the $200,000 loan transaction between William Magill and plaintiffs, including quotations from a transcript in which it appears that Magill and his wife are being questioned by federal agents; detail and speculation relating to the murder of Agnes Brush, who was Magill's sister-in-law; and details of the relationship between plaintiffs and Harvey Leach. A paragraph appearing towards the end of the article states:

> Locricchio and Francell — and their attorney, Theodore Tetzlaff of Chicago — are puzzled by the coincidences. But they say that they are only coincidences.

4. *Tuesday, April 24, 1979: "The Pine Knob Story: A Brush With Bankruptcy."*

Part Three of the Pine Knob Story appeared on the front page and page 4A of the April 24, 1979, edition of *The Detroit News*. The article was written by Wendland and Gadomski and entitled: "The Pine Knob Story: A Brush with Bankruptcy." Beneath the headline, an itali-

cized inset contains the same catchy description published in Parts One and Two ("Is It Mafia?")

Part Three describes FBI investigations of plaintiffs in 1972 and 1975 and an unrelated 1975 FBI investigation into suspected hidden ownership interests in the Aladdin Hotel and Casino in Las Vegas. The details of these investigations are interwoven so as to suggest a continuous chain of events. The article begins:

> In October, 1975, the sprawling Pine Knob entertainment complex in Oakland County's Independence Township was dangerously close to turning belly-up.
>
> * * *
>
> In view of these difficulties and reports Pine Knob "is Mafia connected", Locricchio and Francell agreed to talk in depth about their financial affairs.
>
> The financial difficulties were but part of their troubles, say Locricchio and Francell. At this time the FBI showed up to tell them they were going to be indicted.
>
> The government agent who paid Pine Knob a visit was William F. X. Kane, of the FBI's Detroit field office. Kane testified in subsequent court appearances that he had been told to investigate the Pine Knob partners in the fall of 1972.
>
> The reason for the FBI interest was a $200,000 loan Locricchio and Francell had received in July, 1972, from Detroit-area auto supplier William Magill. To hide the source, the money had been "washed" or routed through a Toronto financier.
>
> Joseph Burnett, the financier, was known to the FBI as an associate of a Mafia money man

(investor). The bureau was puzzled over why the $200,000 loan was deliberately obscured.

Kane, who was on medical leave from the FBI and unavailable to News reporters, said in a 1978 court hearing that he could not recall the details of his conversation with the Pine Knob owners.

Locricchio, however, says he can:

> He told me that there's indictments on the desk (against Locricchio and Francell). He said, "I can stop them".

But there was a catch. "'I want you to go to Las Vegas,'" Locricchio says the FBI agent told him. "'I want you to be my eyes and ears.'"

Specifically, Kane wanted a "snitch" who could "get close" to another case — the suspected hidden ownership of the Aladdin Hotel and Casino, Locricchio said.

The FBI had been tipped that the hotel was secretly controlled by two Detroit men, James "Occo" Tamer, a Mt. Clemens industrialist, and Charles "Chuckie" Goldfarb, millionaire Detroit bail bondsman.

Kane knew Locricchio had recently been offered a job by Tamer, the casino's entertainment director. Tamer wanted Locricchio to design and build a huge Theater for The Performing Arts, patterned after the Pine Knob Music Theater he had built in Michigan.

Locricchio says he turned down Kane and angrily ordered him out of his Pine Knob office. Then he accepted the job from Tamer.

Nineteen months later, in May, 1977, Locricchio and Francell were indicted by a federal grand

> jury, charged with lyhing about the Magill loan on a mortgage application from a federally insured bank. They pleaded guilty and were fined $500. It is the only time that either man has been convicted of a crime.

These paragraphs state in essence that plaintiffs were indicted and pled guilty to charges resulting from an FBI investigation into possible Mafia connections related to the Magill loan transactions.

Part Three then discusses Mr. Locricchio's involvement in the design and construction of the Theater for the Performing Arts in Las Vegas. The article states in essence that Mr. Locricchio was asked to design the theater by James Tamer at a time when Tamer and his partner, Charles Goldfarb, were being investigated by the FBI for holding a hidden interest in the Aladdin Hotel, charges of which Tamer and Goldfarb were later convicted. Although Mr. Locricchio was initially only to design the theater, according to Part Three Tamer later asked him to build it. The article states:

> Locricchio estimated construction costs at $6 million. It ended up costing $10 million.
>
> * * *
>
> An FBI affidavit filed in the Aladdin case quoted an unnamed informant as claiming that Locricchio was secretly offered a "piece" of the Aladdin in exchange for his work on the music theater. For awhile, sources say, the FBI questioned whether the $4 million cost overrun was possibly an illegal "bonus" to Locricchio.
>
> Locricchio angrily denies an offer of ownership by Tamer and says he got $250,000 for designing and building the facility, "which was a drop in the bucket compared to what it was worth".

5. *Wednesday, April 25, 1979: "The Pine Knob Story: Partners Stalked by Mafia Hunters."*

Part Four of the Pine Knob Story appeared in the April 25, 1979, edition of *The Detroit News*. The article, which was written by Wendland and Gadomski, appeared on the front page and page 10A under the headline "The Pine Knob Story: Partners Stalked by Mafia-Hunters", and contained the same italicized subhead as the preceding three articles (e.g., "Is it Mafia?").

In the text of Part Four, the words "Mafia", "organized crime", "Sicilian family", and "Sicilian heritage" are sprinkled throughout. Two paragraphs of the article state:

> Locricchio's is an extremely large family and there are a considerable number of other Joseph Locricchios in the Detroit area, *which has been known to confuse police and journalists.*
>
> * * *
>
> Together, Joseph J. Locricchio and his partner, Francell, travel a great deal, usually on business. The two, both skin divers, often vacation together. They have year-round suntans. Locricchio has his own airplane, a six-seater twin-engine.

APPENDIX C

The Court finds the following facts are true; or, at least, the plaintiffs have not proven them to be false:

* Plaintiffs purchased Pine Knob from individuals who had been indicted by a federal grand jury for concealing their ownership interests in a Las Vegas hotel.

* Plaintiffs' names appeared on the organized crime lists of the Federal Bureau of Investigation.

* Plaintiffs were personal friends of, or had done business with, innumerable individuals whose names are commonly associated with organized crime, including Leonard Schultz, Dominic Corrado, Joseph Burnett, Fred Gordon, James Tamer, Charles Goldfarb, Harvey Leach, Charles Monazym and Jack Tocco.

* In the course of their investigations, agents of the Federal Bureau of Investigation spoke with plaintiffs' bankers and referred to plaintiffs as "crooks."

* A federal grand jury indicted plaintiffs on three counts of filing false statements on a loan application made to Detroit Bank & Trust.

* Plaintiffs pleaded guilty in federal court to giving false information on an application for a loan, in violation of Federal law.

* The bulk of the financing required to develop Pine Knob occurred after the publication of the 1972 Detroit News Article that plaintiffs claim caused "all their problems."

* Plaintiffs' names surfaced in the investigations of both the Agnes Brush and Harvey Leach murders. The Detroit News, in its coverage of those two investigations, never identified plaintiffs as suspects, but the Detroit News did identify (at that time and in the 1979 series) a 61 year old laborer as the only suspect in the Agnes Brush murder.

* Plaintiffs told the Federal Bureau of Investigation in 1973 that they were already then tired of hearing rumors that organized crime was connected with their business.

* Plaintiffs furnished a legal memorandum and statements by their attorneys confirming for The Detroit News their allegations that the Federal Bureau of Investigation had harassed them by visiting their lenders and bankers from 1973 through 1977.

* Joseph Locricchio admitted in previous testimony and in this trial that he knew of the Federal Bureau of Investigations's special interest in James Tamer and of the agency's investigation into hidden ownership of the Aladdin Hotel and Casino before he went to Las Vegas at James Tamer's request.

* Despite speculation to the contrary, the only evidence on record shows plaintiffs were turned down in 1976, well before the complained of publications, for loans because of "high living", a reputation that they were not prompt with payment of their debts, and rumors of organized crime involvement. No evidence has been introduced, and no banker has testified that they relied on the complained of publications in turning down plaintiffs' loan applications.

* Plaintiffs admit a separation between themselves and their primary lender, Borg Warner, for acts prior to May, 1978 and resulting legal actions in which plaintiffs attributed millions of dollars in damage to the businesses to Borg Warner.

* Plaintiffs admit filing a lawsuit against the Hilton Hotel chain, The Reminder Newspaper, and several individuals, blaming them for the defeat of the referendum that would have allowed plaintiffs proposed hotel and for causing plaintiffs $100,000,000 in damages.

ORDER GRANTING DEFENDANTS' MOTION FOR DIRECTED VERDICT

(State of Michigan — Circuit Court — County of Wayne)

(Dated January 5, 1987)

(JOSEPH LOCRICCHIO and GARY FRANCELL, Plaintiffs, vs. THE EVENING NEWS ASSOCIATION, INC., PETE WALDMEIR, BILL GILES, MICHAEL WENDLAND, JEAN GADOMSKI, et al, Defendants — Case No. 80 012 415 CZ)

At a session of said Court, Held in the City-County Building, In the City of Detroit, County of Wayne, State of Michigan, on: JANUARY 5, 1987.

PRESENT: HON. Michael J. Connor,
Circuit Judge.

Defendants' Motion for Directed Verdict having come on for hearing and the court having heard oral arguments and having considered all briefs and memoranda filed by the parties,

IT IS HEREBY ORDERED that Defendants' Motion for Directed Verdict be and hereby is granted for the reasons set forth in the Court's written opinion dated December 11, 1986.

/s/ HON. MICHAEL J. CONNOR
Circuit Judge

Approved as to form only:
/s/ Jeremiah J. Jenney (P 24810)
Attorney for Plaintiffs
/s/ Richard E. Rassel (P 19243)
Attorney for Defendants

(Certification Omitted)

OPINION [*REINSTATING JURY VERDICT*]

(State of Michigan — Court of Appeals)

(Dated February 24, 1989)

(JOSEPH LOCRICCHIO and GARY FRANCELL, Plaintiffs-Appellants, v EVENING NEWS ASSOCIATION, MICHAEL WENDLAND and JEAN GADOMSKI, Defendants-Appellees, and PETE WALDMEIR and BILL GILES, Defendants — No. 98002)

Before: Gillis, P.J., and Doctoroff and K. N. Sanborn,* JJ.

PER CURIAM

Plaintiffs appeal as of right from the trial court's order granting the Evening News Association's, Michael Wendland's and Jean Gadomski's motion for a directed verdict. We reverse and reinstate the jury's verdict.

Defendant Evening News Association publishes the Detroit News. Reporters Wendland and Gadomski prepared a series of articles regarding plaintiffs' development and operation of Pine Knob. Plaintiffs sued, claiming libel. Defendants submitted interrogatories requesting plaintiffs to identify statements claimed to be false statements of fact. Plaintiffs responded that their defamation claim was not necessarily based upon a false statement contained in any particular article and, instead, was based upon the entire series of articles which falsely portrayed, implied, and insinuated that, among other things, they were members or associates of the Mafia, engaged in questionable financial arrangements and were involved in other criminal conduct. Defendants moved for summary judgment, arguing that, because plaintiffs admitted that their allegations of

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* Circuit Judge, sitting on the Court of Appeals by assignment.

defamation were not based upon specific false statements contained in the articles, they did not have a cause of action for libel. The trial court denied defendants' motion and this Court granted defendants' application for leave to appeal.

On appeal, defendants claimed that plaintiffs' allegations that the series of articles falsely portrayed plaintiffs as members or associates of organized crime could not support an action for libel. This Court disagreed, holding:

> "'"To test its libelous quality, a publication is to be considered as a whole, including the character of the display of its headlines when the article is published in a newspaper, and the language employed therein."' *Sanders* v *Evening News Ass'n*, 313 Mich 334, 340; 21 NW2d 152 (1946), [quoting the syllabus of *Gustin* v *Evening Press Co*, 172 Mich 311; 137 NW 674 (1912)]. The pleadings, including plaintiffs' answers to the interrogatories, raise a genuine issue of material fact as to whether the specified articles, read as a whole, carry a defamatory insinuation or inference that plaintiffs are associated with organized crime. Insinuation, imputation or inference may be as defamatory as a direct, unveiled assertion. See *Caldwell* v. *Crowell Collier Publishing Co*, 161 F2d 333, 335-336 (CA 5), cert den 332 US 776 (1947); *Memphis Publishing Co* v *Nichols*, 569 SW2d 412, 419-420 (Tenn 1978); 50 Am Jur 2d, Libel & Slander, § 13, pp 528-529; Prosser, Torts, (4th ed, 1971), § 111.
>
> "Plaintiffs did not concede the truth of the alleged insinuation. They specifically state in their response to interrogatories that the entire series of articles represented 'a *false* portrayal,

> implication, imputation and/or insinuation' that plaintiffs are or were members and/or associates of an organized criminal society, otherwise known as the Mafia.
>
> "The pleadings have given rise to a genuine issue of material fact which is to be left to the trier of facts and cannot be disposed of by summary judgment.
>
> "The trial court properly denied defendant's motion for summary judgment." *Locricchio* v *Evening News Ass'n, Inc*, (unpublished per curiam opinion; Docket No. 64729, rel'd 8/24/83), pp 2-3, lv den 419 Mich 860 (1984), reconsideration den 419 Mich 860 (1984), cert den 469 US 1018; 105 S Ct 433; 83 L Ed 2d 360 (1984). (Emphasis in original.)

The case then went to trial. The above-named defendants moved for a directed verdict which the trial court took under advisement. The jury returned a verdict in favor of plaintiff Francell in the amount of $3,000,000, but against plaintiff Locricchio, finding no publication.

The trial court then issued the following opinion:

> "The basis of plaintiffs' defamation suit were eleven articles published between April 28, 1978 and April 25, 1979 which concerned the activities of Joseph Locricchio and his partner Gary Francell. Included in these articles was a four-part series collectively entitled 'The Pine Knob Story' which was published in the Detroit News for four consecutive Sundays, commencing Sunday, April 22, 1979.
>
> "Plaintiffs claimed that viewed as a whole, the articles by innuendo, insinuation, implication and inference falsely portrayed plaintiffs as mem-

bers of the Mafia; linked them with two unsolved murders; and suggested they were involved in a series of illegal financial arrangements.

"Where allegedly defamatory speech is of public concern, the First Amendment demands and Michigan law requires that the plaintiff, whether public official, public figure, or private individual, prove the statements at issue to be false. *Philadelphia Newspapers Inc* v *Hepps*, 54 Law Week 4373 [475 US 767; 106 S Ct 1558; 89 L Ed 2d 783 (1986)]; *Ledl* v *Quick Pik Food Stores Inc*, 133 Mich App 583; 349 NW2d 529 (1984); SJI 2d 118.05, 118.07

"The Court holds the plaintiffs have failed to prove the publications at issue contained significantly false facts, and a verdict must be directed for the defendant [sic]. In the case at bar the plaintiffs urge the Court to disregard the underlying facts and suggest it is the 'inferences' which may be drawn from the articles which comprise the false statements constituting the defamation.

"This argument is contrary to both Michigan law and Federal law as well.

"Insinuation, imputation, or inference may be as defamatory as a direct unveiled assertion. *Simons* v *Burnham*, 102 Mich 189; 60 NW 476 (1894); *Caldwell* v *Crowell Collier Publishing Co*, 161 F2d 333, 335-336 (CA 5), cert den 332 US 776 (1947). *Memphis Publishing Co* v *Nichols*, 569 SW2d 412, 419-420 (Tenn 1978); 50 Am Jur 2d, Libel & Slander, § 13, pp 528-529; Prosser, Torts (4th ed), 1971, § 111. *Schultz* v *Reader's Digest Ass'n*, 468 F Supp 551 (ED Mich, 1979). *Locricchio*

v *Evening News Ass'n*, Docket No. 64729. However, liability cannot be imposed for journalistic inferences allegedly arising from the reporting of true facts about matters of public interest and concern. The plaintiff must prove the false impression arises from untrue, or undisclosed facts. *Sanders* v *Evening News Ass'n*, 313 Mich 334 (1946), *Strada* v *Connecticut Newspapers Inc*, 193 Conn 313; 477 A2d 1005 (1984); *Herbert* v *Lando*, 781 F2d 298 (2d Cir 1986).

"In *Sanders* v *Evening News Ass'n*, 313 Mich 334 (1946), the plaintiff was a former judge who complained about Detroit News reports that he had held court in the Bethune Police Station at night by banging his gavel on the desk and shouting 'Court's in Session'. The plaintiff did not dispute any fact in the articles as false but disputed the implication that he was acting improperly. Plaintiff stated his claim as follows:

> "'[Defendant] by the publication meant to convey that the plaintiff was guilty of misfeasance, malfeasance and corrupt practices in the office of judge of the common pleas court, and thereby "maliciously to injure the plaintiff, in his good name, fame and credit, and to bring him to . . . public scorn, mockery, ridicule, and contenpt.' (p 339)

"Despite plaintiff's attempt to couch his falsity requirement in innuendo or implication, the Court affirmed the lower court's summary judgment. The Court reviewed the articles as a whole, including the character and display of headlines, and stated in part:

"'Our review of this record brings the conclusion that under plaintiff's own pleadings he is not entitled to recover in consequence of the publication of July 27, 1942. This is because in his amended declaration plaintiff admits the truth of the July 27th publication in so far as it could possibly tend to support an action for libel. Since the publication was true, it was not libelous. *Sullings* v *Shakespears*, 467 Mich 408 (41 AM Rep 166) (at pp 339-340) [sic *Sullings* v *Shakespeare*, 46 Mich 408; 9 NW 451 (1846).'

"While numerous federal cases have 'struggled . . . to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment' (and counsel seem to have cited most of them), one recent decision which canvassed the entire area of inference and innuendo is particularly enlightening.

"In *Strada* v *Connecticut Newspapers*, 477 A2d 1005 (Conn 1984), the plaintiff brought a libel action claiming injury by innuendo from news reports that detailed plaintiff's relationship with an organized crime figure. The trial court, in a finding supported by the appellate court, concluded that each claimed falsehood of fact or quotation was either true or substantially true and liability could not be imposed for innuendo allegedly arising from the reporting of true facts.

"'But in the instant case, the plaintiff seeks to recover from a publication where all the underlying and stated facts have been proved to be true, or substantially true, claiming that the "slant" of the article

gives rise to allegedly false and defamatory implications. Unlike *Memphis Publishing Co* v *Nichols*, *supra*, the plaintiff here has not alleged, nor has our examination of the record disclosed, the existence of additional material facts which, if reported, would have changed the tone of the article. In the absence of such undisclosed facts, first amendment considerations dictate that an article concerning a public figure composed of true or substantially true statements is not defamatory regardless of the tone or innuendo evident. (p 1010) (Footnote omitted.)

* * *

"'When any inference or innuendo does not arise from the omission of material facts, but rather from the editorial choice of layout, the plaintiff may not recover for libel by innuendo. The media would be unduly burdened if, in addition to reporting facts about public officers and public affairs correctly, it had to be vigilant for any possibly defamatory implication arising from the report of those true facts.' (p 1012)

"In ruling on the motion for directed verdict the court has accepted the facts as submitted by the plaintiff and has viewed the evidence in the light most favorable to the plaintiff. The court finds the plaintiff has failed to establish a prima facie case having failed to demonstrate the underlying facts and circumstance were false.

"Defense motion for directed verdict is granted." (Footnotes and appendices omitted.)

In *Allen* v *Michigan Bell Telephone Co*, 61 Mich App 62, 65; 232 NW2d 302 (1975), lv den 395 Mich 793 (1975), this Court held:

> "The term 'law of the case,' as generally used, designates the principle that if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain the same."

The legal question in this case was whether plaintiffs could have a cause of action for libel where their allegations of defamation were not based on a specific false statement in any particular article. Our first opinion in this case answered that question affirmatively.

The trial court's opinion notes an exception to this rule and claims that that exception is supported by our Supreme Court's decision in *Sanders*, *supra*, adopting defendant's interpretation of that case. We note that defendants raised this same claim in their first appeal and it was implicitly rejected by our Court's original opinion which cited *Sanders*. Moreover, we do not believe that the United States Supreme Court's decision in *Philadelphia Newspapers, Inc*, *supra*, which held that where a newspaper publishes speech of public concern about a private figure, the plaintiff cannot recover damages without also showing that the statements at issue were false, bars a suit for defamation by implication. See, e.g., *Herbert*, *supra*, 307.

In light of our previous opinion and our belief that subsequent law has not eliminated defamation by implication, we reverse the trial court's order granting appel-

lants' motion for a directed verdict and reinstate the jury's verdict.

/s/ John H. Gillis
/s/ Martin M. Doctoroff
/s/ Kenneth N. Sanborn

ORDER [*DENYING REHEARING*]

(State of Michigan — Court of Appeals0

(Dated May 22, 1989)

(Locricchio v Evening News Ass'n — Docket # 98002; L.C. # 80-012415 CZ)

John H. Gillis, Presiding Judge;
Martin M. Doctoroff, Kenneth N. Sanborn*, Judges.

The Court orders the motion for rehearing is DENIED.

/s/ John H. Gillis

(*Certification Omitted*)

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* Circuit Judge, sitting on the Court of Appeals by assignment.

ORDER OF JUDGMENT ON JURY VERDICT

(State of Michigan — Circuit Court — County of Wayne)

(Dated August 4, 1989)

(JOSEPH JUDEUS LOCRICCHIO and GARY FRANCELL, Plaintiffs, vs. THE EVENING NEWS ASSOCIATION INC., a Michigan corporation, PETE WALDMEIR, BILL GILES, JEFF LADERMAN, MICHAEL F. WENDLAND, JEAN GADOMSKI, RICHARD WILLING, ROBERT ANKENY and JIM GRAHAM, Jointly and Severally, Defendants — Case No: 80-012415-CZ; Hon. Michael J. Connor)

At a session of said Court held in the City of Detroit, County of Wayne, State of Michigan on: AUGUST 4, 1989.

PRESENT: HONORABLE MICHAEL J. CONNOR

This matter having been tried before a jury and the jury having rendered its verdict in favor of plaintiff Gary Francell and against the defendants in the amount of Three Million ($3,000,000.00) Dollars, and the jury further having rendered a verdict in favor if the defendants and against plaintiff Joseph Locricchio;

IT IS HEREBY ORDERED AND ADJUDGED that a judgment be and same is hereby entered in favor of defendants and against Joseph Locricchio of No Cause of Action together with any costs and attorney fees as may be allowed by the Court;

IT IS FURTHER ORDERED AND ADJUDGED that a judgment be and same is hereby entered in favor of plaintiff Gary Francell and against the defendants in the amount of Three Million ($3,000,000.00) Dollars with statutory interest and any costs and attorney fees as may be allowed by the Court.

IT IS FURTHER ORDERED AND ADJUDGED that defendants are not required to post an appeal bond until further order of this Court.

IT IS FURTHER ORDERED AND ADJUDGED that the time limits for the filing of post-judgment motions are hereby stayed pending a decision on defendants' Application for Leave to Appeal by the Michigan Supreme Court Docket No. 86351.

/s/ Michael J. Connor
CIRCUIT COURT JUDGE

APPROVED AS TO FORM:

By: /s/ JAMES E. STEWART (P23254) */by consent*
Attorneys for Defendants
1650 First National Building
Detroit, Michigan 48226

By: /s/ JEREMIAH J. KENNEY (P24810)
Attorney for Plaintiffs
One Woodward Avenue, 10th Floor
Detroit, Michigan 48226

ORDER [*DENYING REHEARING*]

(State of Michigan — Supreme Court)

(Entered October 17, 1991)

(JOSEPH JUDEAS [*sic*] LOCRICCHIO and GARY FRANCELL, Plaintiffs-Appellees, v EVENING NEWS ASSOCIATION, MICHAEL WENDLAND and JEAN GADOMSKI, Defendants-Appellants, and PETE WALDMEIR and BILL GILES, Defendants — SC: 86351; COA: 98002; LC: 80-12415 [*sic*, -012415] -CZ; Rehearing No. 259)

Michael F. Cavanagh, Chief Justice;
Charles L. Levin, James H. Brickley, Patricia J. Boyle, Dorothy Comstock Riley, Robert P. Griffin, Conrad L. Mallett, Jr., Associate Justices.

In this cause, a motion for rehearing is considered and, on order of the Court, it is hereby DENIED.

(*Certification Omitted*)

EXCERPTED TRIAL TRANSCRIPT

(State of Michigan — Circuit Court — County of Wayne)

* * *

FROM TRANSCRIPT VOLUME VI:
TESTIMONY OF DEFENDANT MICHAEL F. WENDLAND

* * *

(117) * * * Q. Now in about the late spring, early summer of 1978, you also received another request from Mr. Norman Borris about Pine Knob, did you not?

A. That was the first time I had ever received a request about Pine Knob.

Q. Correct, the first time.

A. You said "another."

Q. Well, you received a request from Mr. Borris in late spring or early summer of 1978, coinciding approximately with the date of your book on the Arizona (118) project?

A. Coinciding I think with the completion of my book on the Arizona — not the publication.

Q. Mr. Borris came to you and said, in effect, we'd like to have you look into whatever rumors there are about Pine Knob and organized crime, isn't that right?

A. I'm not entirely certain whether it was Norman Borris or another editor at the Detroit News named Gary Shuster, who gave me that request. It was whoever held the News editor's job, either Norm or Gary at that time.

Q. One of your superiors, right?

A. Yes.

Q. At least in terms of hierarchy at the News, he's one of your superiors.

A. He was my boss.

Q. In any event, you didn't do much about that request at that time, did you?

A. Yes.

Q. You did?

A. Yes.

Q. You went out and checked some records and just basically left it on your desk?

A. I went out and checked some records.

Q. You didn't do much else in that regard, did you?

(119) A. No.

Q. About six months later you got another request from another superior to do a story, or to at least do an investigation into allegations of Mafia/organized crime involvement at Pine Knob?

A. Yes.

Q. And that was from another — at least a supervisor, Mr. Lutz, right? And you were told or you learned Peter Clark, the publisher, had asked the city desk to assign a reporter to look into these rumors?

A. No, that's not correct.

Q. Did you learn at some point in time that Peter Clark was interested in having somebody do an investigation?

A. Yes, sir.

Q. When did you learn that?

A. In the summer of 1978.

Q. So you knew at least before even Mr. Lutz came to you that the publisher of the paper was interested in having a story done?

A. I was told his name. I did not know for sure whether — how interested he was. I was told he had passed on some interest to the news desk, which in turn asked me in that summer to take a look at it. I did do that.

Q. I think you heard Mr. Lutz testify just a little bit earlier that the way a number of stories get generated (120) in a newspaper is you hear something from one source, something from another source, something from

another source and perhaps there's some interest in it. Is that — you did hear that?

A. I did hear that.

Q. And did you — that's basically right?

A. Sure, that's one of the ways newspapers get stories.

Q. As the reporter on the Detroit News, 1971 up until early spring/early summer/late spring 1978, did you ever on your own go out and attempt to do an investigation into, quote unquote, "organized crime involvement at Pine Knob"?

A. Not an investigation, *per se*. By "investigation," I mean an intensive look at.

Q. And that's what ultimately you did — an intensive look at Pine Knob in 1979, is that right?

A. That is right.

Q. But up until that time, you never felt the — at least felt the desire to go do that on your own, is that right?

A. No, I had attempted to talk to your clients back during the Harvey Leach story.

Q. I'm going to get to that in a minute. In fact, you never even printed their name in connection with the Harvey Leach story, did you?

(121) A. That's right.

Q. They were not suspects in the Harvey Leach murder, were they?

A. At that time I did not know that they were.

Q. Now as of 1979, you knew they weren't, didn't you?

A. I was not sure. I had never run across their names until they told me their involvement with Harvey Leach.

Q. You knew in 1979 that Mr. Locricchio and Mr. Francell were never suspects in the Harvey Leach story, isn't that correct?

A. I don't believe they were. I can't say I knew that they weren't. I had no information that they were suspects.

Q. Well, let me ask it this way, Mr. Wendland. You pride yourself, do you not, on your ability to do hard-nosed investigation, isn't that correct?

A. I think that's a rather vain term, "pride myself," but I try to do a good, if you want to use the term "hard-nosed," investigation.

Q. You don't — you try not to leave any stones unturned, shall we say?

A. I try to turn over all that I can.

Q. All that you know about? And in your investigation, your intensive investigation into the Pine Knob story, you never came across anybody that told you that Mr. (122) Locricchio and Mr. Francell were suspects in either the Harvey Leach murder or the Agnes Brush murder, did you?

A. Not suspects.

Q. As a matter of fact, as far as you were concerned they were not suspects, isn't that right?

A. At that time I didn't think they were.

Q. "At that time" — what are you talking about?

A. 1979.

Q. And in 1974 you didn't think they were either, did you?

A. In 1974 I didn't really know much about your clients at all.

Q. Well, you were doing an intensive investigation into the demise or death of Harvey Leach, weren't you?

A. Yes, sir.

Q. You were looking to see — because that would be a pretty big scoop for you, wouldn't it, if you were to find somebody who's really a suspect?

A. I think that would have been a pretty good story.

Q. And you were looking for that pretty good story, weren't you?

A. I was trying to cover the Harvey Leach murder, in the aftermath of an investigation.

Q. You were looking for that pretty good story?

A. I was trying to cover the story as best as I could. If it's a good story, fine. There were a lot of good (123) stories; there were some just plain dull, repetitious stories.

Q. And even back in 1974 you never turned up the name Locricchio or Francell as suspects in these murders, did you?

A. Not as official police suspects, no.

Q. Not as official police suspects. What do you mean by "not as official police suspects"?

A. Now I have no pipeline to the police. No one's going to say 'This guy's a suspect and this guy's a suspect.' I had no idea that your clients were linked, so to speak, to Leach until I talked to your clients in 1979. All I knew in '74 was that they had accepted a loan, a loan from a well-known organized crime figure, and the man who I did know was the number one suepect in the Harvey Leach case.

Q. You knew that they were in some fashion, even in 1974, or in some fashion — strike that. Let's talk about Agnes Brush for a moment. Did you ever have any information that Mr. Locricchio or Mr. Francell were in any way suspects in the Agnes Brush murder?

A. Investigated, but not suspects.

Q. How do you differentiate, Mr. Wendland, between the term "investigated" and "suspect"?

A. I think most police hold the theory that anybody (124) involved is a suspect until proven otherwise. As a reporter, if someone is investigated and nothing is led further, or it doesn't become apparent to me that the police are zeroing in on their motives or their involvement, I tend to consider them investigated rather than a suspect.

I guess what you're doing is you're asking me to really in a way sum up what I think the police were doing. I

don't know whether they were police suspects. I don't think so. I know they were investigated.

Q. You know that their names may have come up at some point in time, along the same types of lines as anybody else's name might have come up?

A. No, their names came up a lot stronger than anybody else's might.

Q. Is that right, in the Agnes Brush murder?

A. Yes, sir.

Q. In what police agencies did their names come up a lot stronger?

A. Off the top of my head, I'd be — I think the Agnes Brush case was investigated by — primarily by, when I got into it, the Wayne County Organized Crime Strike Force. It was investigated peripherally by the Royal Canadian Mounted Police, the Ontario Provincial Police.

Q. That's her murder we're talking about?

(125) A. The conditions surrounding the murder.

Q. I'm talking about the murder.

A. Well, they investigated the murder.

Q. The Royal Canadian Mounted Police investigated the murder of Agnes Brush?

A. Yes, they did.

Q. And in what connection did they do that?

A. They were attempting to determine the involvement of your clients and some of the people that were involved in financial — the questionable financial dealings of the Magill loan and whether that indeed was a part of the motive that led to the Agnes Brush murder.

Q. Well, that was in 1972, wasn't it?

A. What?

Q. The murder?

A. Uh — without looking at notes, I don't know; if it's '72, it's '72.

Q. Well, did you ever — you got into this story in 1979?

A. In what story, the Pine Knob story, I was investigating the — I did the Brush story in 1974, when I was working on the Harvey Leach crime — story.

Q. Did you mention Mr. Locricchio and Mr. Francell in connection with the Agnes Brush story?

A. I did not.

Q. So then it was hot news, that was Agnes Brush, at least (126) two years after her death?

A. Is that a question or a statement?

Q. Well, I'm going to get there. You said you reported on the Agnes Brush in 1974?

A. In connection with the Harvey Leach case.

Q. Well, in 1974 is the question, right?

A. I think that's the first time I reported on Agnes Brush.

Q. No mention by Wendland. Let's take Harvey Leach. Now, that was also in 1974, correct, that your articles appeared on Harvey Leach?

A. Yes, sir.

Q. You didn't mention anything about my clients then either, did you?

A. Not their names. I mentioned information about your clients.

Q. Back in 1974 there was a Pine Knob complex, was there not?

A. Yes, sir.

Q. It involved skiing?

A. (No response.)

Q. Yes?

A. Yes.

Q. And entertainment?

A. (No response.)

(127) Q. Yes?

A. Yes.

Q. And it involved lots of people?

A. Sure.

Q. You didn't see any reason, when you were actually investigating the murders of these two people at the time, or surrounding the time when they were murdered, to mention my clients' names, did you?

A. No, sir.

Q. Your job was basically to separate the rumor of Pine Knob and Mafia involvement from the facts, isn't that right?

A. Yes, generally I think so.

Q. And were you ever able to separate the rumor from the truth about organized crime involvement in Pine Knob, to your satisfaction?

A. I think so, yes.

Q. Because you don't think there is any organized crime involvement in the ownership of Pine Knob, do you?

A. Not in the ownership of Pine Knob.

Q. Well, you sat here in court the other day — when we're talking about the ownership, we're talking about Mr. Locricchio and Mr. Francell, aren't we?

A. Uh-huh.

Q. They're synonymous, Mr. Rassel told us that, at least (128) they were in 1979. You thought that, right?

A. Thought what? That organized crime and your clients were synonymous?

Q. No, that Pine Knob and Locricchio and Francell were synonymous.

A. Oh, yes.

Q. And after you began your investigation, and at the completion of your investigation, but while you were writing the articles, it was your feeling that there was no organized crime involvement in Pine Knob?

A. There was organized crime involvement in Pine Knob. I don't think your clients, the owners of Pine Knob are organized crime figures, or card-carrying members of the Mafia, if there is such a thing.

Q. Let me ask you this, after you began your investigation, and at the completion of your investigation, while you were writing the articles, was that your feeling, that there was no organized crime involvement in Pine Knob?

A. That was not my feeling.

Q. Let me ask you, do you recall testifying at a deposition in my office on June 2nd, 1982?

A. I generally recall that. If you're going to read it, could I have a copy of it?

Q. Sure. Do you recall at page 48, do you recall that I (129) asked you that exact question, three years ago?

A. I'm looking at it now.

Q. "After you began your investigation," line 9, "and at the completion of your investigation, but while you were writing the articles, was that your feeling, that there was no organized crime involvement in Pine Knob? Answer: —" What's your answer?

A. My answer there is "Yes."

Q. Thank you.

A. Not with —

MR. STEWART: (Simultaneously) May we in the interest of fairness have line 14, the question at line 14, the very next question and answer read, please?

THE COURT: All right, go ahead.

THE WITNESS: (Simultaneously) The one above that too.

THE COURT: Well, all right.

BY MR. KENNEY:

Q. All right, let's —

THE COURT: What page are we on?

MR. KENNEY: Well, now we're on page 47.

BY MR. KENNEY:

Q. "Were you ever able to separate," and now I'm at line 24, page 27, "Were you ever able to separate the

rumor (130) from the truth about organized crime involvement in Pine Knob to your satisfaction?

"Answer: Yes, to my satisfaction, I believe so.

"Question: And what was that separation?

"Answer: I don't believe there is any organized crime involvement in the ownership of Pine Knob.

"Question: Was that your feeling before these articles appeared, sir?

"Answer: I had no feeling, I didn't know.

"Question: After you began your investigation and at the completion of your investigation, but while you were writing the articles, was that your feeling, that there was no organized crime involvement in Pine Knob?

"Answer: Yes.

"Question: That's what your investigation had shown to your satisfaction, at least?

"Answer: I was satisfied that I could not say that Pine Knob was an organized crime business it was not provable that I could find. I don't believe there was any."

Do you recall those questions and those answers?

A. I recall those questions.

(131) Q. Do you recall those answers?

A. Yes.

Q. And you told me back in June of 1982 that after your investigation began and at the completion of your investigation, it was your feeling that there was no organized crime involvement in Pine Knob?

A. In the ownership of Pine Knob. Then you restated the question, and then we, again if you look at the answer,

"The ownership of Pine Knob was not an organized crime business."

Q. You did tell me, under oath, with your lawyer present, in 1982, that you did not believe there was any organized crime involvement in Pine Knob —

A. In the ownership of Pine Knob.

Q. On line 4 —

A. In the ownership of Pine Knob, which is what I've just said today.

Q. I'll read it to you one more time. You did tell me this,

> "After you began your investigation, and at the completion of your investigation, but while you were writing the articles, was that your feeling, that there was no organized crime involvement in Pine Knob?
>
> "Answer: Yes."

That's an accurate transcription of what took place, is it not?

(132) A. That part of it is, but you've got to put it in context.

Q. You're in the word business, aren't you, Mr. Wendland, that's what you do for a living, is listen to people's questions — in fact, you phrase questions yourself, don't you?

A. Yes sir, I do.

Q. You did not tell me in answer to that question that you were only limiting it to the ownership of Pine Knob, did you?

A. In line 4 I did.

Q. You didn't when I asked you this question,–

> "After you began your investigation, but while you were writing the articles, was that your feeling, that there was no organized crime involvement in Pine Knob?"

You didn't say "Only in the ownership," you said, "Yes." Isn't that right?

A. I answered yes, answering it the same way I was when you asked the question just above that. You're playing a game with me. You took an extra word out of there, after taking my answer the first time, and you are now trying to say I said something different. I told you as clearly as I can. I don't think there's organized crime involvement in the ownership of Pine Knob. I think organized crime has been involved in the — in (133) helping your clients finance Pine Knob, and I also testified I don't think that your clients are organized crime members.

Q. They are not part of organized crime, are they?

A. Not that I know.

Q. Well, that's what your investigation was supposed to turn up, wasn't it?

A. No, it wasn't supposed to turn up that at all.

Q. Well, one way or the other, wasn't that what you were out to do, separate the truth from the rumor?

A. And I think we did that pretty well.

Q. In 1979, in April, 1979, you conducted an interview with Mr. Locricchio and Mr. Francell, is that correct?

A. Yes sir, I did.

Q. That came about, in point of time, after both you and Mr. Giles then editor of the paper, received a letter from an attorney, correct?

A. Yes, sir.

Q. The attorney that wrote the letter was Mr. Theodore Tetzlaff, correct?

A. Yes, sir.

Q. And in fact, Mr. Tetzlaff was present at the April 10th interview that you had with Mr. Locricchio and Mr. Francell, yes?

A. Yes, sir.

(134) Q. You tape recorded that interview?

A. Yes sir, we did.

Q. And basically the tape recorders and the tapes that were used in that interview were supplied by yourself?

A. Yes, sir.

Q. For instance, Mr. Locricchio and Mr. Francell and Mr. Tetzlaff didn't bring their own tape recorder or tapes, right?

A. No, not that I saw.

Q. You took a lot of what was contained there — at least it's your position anyway, you took a lot of what was contained in these articles from that particular interview, did you not?

A. Yes, sir.

Q. Didn't you tell Mr. Locricchio and Mr. Francell and Mr. Tetzlaff that your investigation had shown that they were quote "clean," unquote?

A. I don't recall saying that they were quote, "clean."

Q. Do you recall words to that effect?

A. I recall telling them that I — we did not find any organized crime involvement in the ownership of Pine Knob, nor did we think that your clients were members of the Mafia.

* * *

FROM TRANSCRIPT VOLUME VII:

CONTINUED TESTIMONY
OF DEFENDANT MICHAEL F. WENDLAND

* * *

(12) * * * Q. . . . And by the way, just before I move off of this subject for a moment, when we see the phrase, "Is it Mafia?" in the headline and then it says "Mafia" in the italicized portion in the middle of the page, the "it" refers to Pine Knob, does it not?

A. I would read it that way, yes.

Q. Pine Knob is synonymous with Mr. Locricchio and Mr. Francell?

A. That's — yeah, that's —

(13) Q. No question about it?

A. — right.

Q. So when we're talking about, "Is it Mafia?" we're talking about Mr. Locricchio and Mr. Francell, isn't that right?

A. That is the question that's been asked of them.

Q. And you told them yesterday, regardless of the one question that we had a disagreement about, there's no question in your mind from your investigation that Mr. Locricchio and Mr. Francell are not Mafia, is that right?

A. I don't believe Gary Francell or Joe Locricchio are members of the Mafia.

Q. You knew that when this headline was written, didn't you?

A. Yes, I — that was my conclusion.

Q. Is the answer to this question ever stated in these articles?

A. I think all four articles answer that question.

Q. If you read all four of these articles you sort of get that feeling, is that your testimony?

A. I think that if you read any one of those articles you'd read your clients' response to this constant attention, constant rumors, you'll see them saying, "No, we are not Mafia."

(14) Q. Well, is there anywhere that Mike Wendland says, "No, they're not Mafia"?

A. I can't prove that they're not — my job is not to conclude.

Q. I didn't ask you that.

A. My job is to report.

Q. I didn't ask you that. I asked you, is there any —

MR. STEWART: Wait, wait, wait. I want to object, your Honor. I think Mr. Kenney is again interrupting Mr.

Wendland. I understand it's cross-exam, but I think he's interrupting.

THE COURT: Don't cut him off. Go ahead, is there something else you wanted to add?

THE WITNESS: Let's — please ask the question.

THE COURT: He was about to do that anyway.

BY MR. KENNEY:

Q. Does Mike Wendland say, "Our investigation, our two-month investigation showed me they are not in the Mafia, shows the News they are not Mafia"?

A. No. That's not — that's a conclusion, that is not a finding. That's an opinion, not a finding. My job is not to give opinions, my job is to report the facts, put all the facts out there for people to make up their mind. And that's what we did in this story. They over (15) and over again, point it out how these rumors have pervaded over their whole lives and how these rumors are not true.

* * *

(87) * * * Q. We even put in a hybrid quote, and you'll acknowledge that, will you not, Mr. Wendland, that this paragraph, (88) the third full — I guess it's the fourth full paragraph on the first page about, ". . . even my mother has her doubts," is your interpretation of a rather jumbled statement by Mr. Locricchio?

A. It certainly was a jumbled statement. I think that's an accurate quote of what Mr. Locricchio was telling us.

Q. He didn't say "The feeling that Pine Knob is Mafia is so widespread that even my mother sometimes has her doubts." He didn't say it in exactly that fashion, did he?

A. No sir, not exactly in that fashion.

Q. You say it again, you repeat it again in another portion of the same article, don't you?

A. I don't know, do I? I think that is in another story.

Q. You're right, it is. It's in the story entitled, "Pine Knob story, a brush with bankruptcy," isn't that correct?

A. That's correct.

Q. You repeat that same idea in two different articles, correct?

A. Right.

* * *

FROM TRANSCRIPT VOLUME XI:

TESTIMONY OF DEFENDANT JEAN GADOMSKI

* * *

(20) * * * Q. All right. Could you tell us, ma'am, what your basic role was, not necessarily on the investigative unit, but in the Pine Knob story, specifically what it was (21) you did apart from writing those two columns, two half-columns, what it was that you did?

A. I did a great deal of research.

Q. All right. Tell us about that, if you would. What kind of research did you do?

A. I searched court records, land records.

Q. You went out to the Oakland County Circuit Court and spent how long up there?

A. Weeks.

Q. Weeks. What else, besides going out to the Oakland County courthouse did you —

A. I checked Wayne County records.

Q. Did you much in Wayne County?

A. I found a little, but not as much as in Oakland.

Q. You didn't spend weeks here in —

A. No, I did not

Q. — the City-County Building? Except for now?

A. Yes. I spent a day or so in the catacombs in the Old County building.

Q. Over in the old City-County building?

A. Plus a few hours here, yes.

Q. All right. What else did you do besides go out and check records — anything?

A. I checked our clips.

Q. And when you say you "checked our clips," we've talked (22) about the morgue before — is that what you're referring to, you would have gone to the library or morgue and gotten whatever clips there were available?

A. That's correct.

Q. Now when you went to the morgue or the library, what have you, what — how did you know which — how are they filed, by the way?

A. Alphabetically.

Q. All right. By the names of — or subject matter of the articles?

A. By names of individuals and subject matter, yes.

Q. And when you went to the library or morgue, I imagine the first thing you went through is "Pine Knob"?

A. Correct.

Q. One of the first things. Then you went to "Indusco"?

A. Yes.

Q. Then you went to "Locricchio"?

A. Yes.

Q. And then you went to "Francell"?

A. Yes.

Q. And then where else did you go?

A. Everywhere else I could think of.

Q. All right, and you would have amassed all of the materials that you found in that regard, correct?

A. That's correct.

(23) Q. Other that the City-County building here, the County building out in Oakland on Telegraph Road there —

A. Right.

Q. What other government places did you go?

A. I didn't actually go to Macomb. Mike checked there.

Q. All right.

A. It wasn't necessary for me to go.

Q. Why wasn't it necessary for you to go?

A. There wasn't anything on file that we needed.

Q. All right, and you just established that by way of a phone call, is that the idea?

A. No.

Q. Mike went out there and said nothing —

A. Yes.

Q. — nothing out there, so no sense in you —

A. Making the trip.

Q. Making the trip and spending days looking for nothing?

A. Right.

Q. Okay. Other — what other governmental document storage places did you look besides the three county buildings?

A. Federal court.

Q. All right, and when did you do that in relationship to when these articles appeared?

A. Early on.

(24) Q. And when you went to Federal court, what were you looking — what did you look under?

A. I couldn't recall.

Q. What did you find — anything specific that you can tell us about?

A. I can't recall at this point.

* * *

(39) * * * Q. The — you learned from your investigation that not all of the ten or 13 or 14 police agencies that might have been involved with Mr. Locricchio and Mr. Francell, but their names came up in connection not specifically as suspects to the murders,

but with things that they were alerted to because of the murder?

A. Yes.

Q. Isn't that correct?

A. Yes.

Q. They were never, as far as you could ever determine, suspects in these murders, were they?

A. No.

Q. And your research and investigation that you performed in relation to the Pine Knob story basically did not substantiate that there is any organized crime involvement in Pine Knob, did it?

A. We couldn't prove that.

(40) Q. It didn't substantiate it, did it?

A. We couldn't prove it.

Q. Were you out to try to prove it?

A. No.

Q. On April the 10th, 1979, you accompanied Mr. Wendland to an interview with my clients and Mr. Tetzlaff in an interview at the Wayne County Metropolitan Airport, is that correct?

A. Yes, that's right.

* * *

(49) * * * Q. . . . If I can back up, you in fact did most of the transcription that exists in Exhibit Number Twelve, did you not?

A. Yes, I did almost all of it.

Q. Mr. Wendland has previously testified that he recalls typing about one page?

A. That's right.

Q. You were here when he testified to that?

A. Yes.

Q. Can you point out to us the page that Mr. Wendland typed?

A. He typed the single-spaced page.

Q. Page 11?

A. I'm trying to describe the single-spaced — yes.

Q. And you know that not because of the lack of typographical errors or the fact that they're there, but the fact that it's single-spaced, right?

A. That's right.

Q. That's in the middle of a page, isn't it?

A. Yes.

Q. Why is it, Ms. Gadomski, is — and if you can tell us, why is it that Mr. Wendland would type one page from the middle of the tape? Do you have any idea why that took place?

A. Yes, I do.

(50) Q. All right, why is that?

A. Just to give me some relief. It was kind of tough transcribing it.

Q. And so in the effort of transcribing it he typed and to give you some relief he took one page?

A. Uh-huh.

Q. Out of 43?

A. Yes.

Q. Any other reason why Mr. Wendland would have typed one page out of 43 to give you some relief?

A. I wish he had done more.

Q. But does any other reason —?

A. No.

Q. All right. As a matter of fact, when is the last time before these were played before the Jury a few days ago that you had occasion to listen to these — to those tapes, Sixteen and Seventeen?

A. Yes.

Q. When was the last time before that?

A. When I was transcribing it.

Q. You never heard them from the time that you transcribed them, put them into this form that's Exhibit

Twelve to the time that they were played in court, is that correct?

A. No, I don't think so.

(51) Q. All right. Did you — and you do recall hearing some things that are on the tape that were not transcribed into this transcription, isn't that correct?

A. There were some little things, yes.

Q. What was the reason for that?

A. No special reason. I just didn't see any reason to include them.

* * *

(84) * * * Q. Occasionally, in fact many — oftentimes, you wrote in your transcription, and if you will refer to page nine as an example, you have at the top "tape garbled, but gist of conversation goes as follows"?

A. Uh-huh.

Q. Correct?

A. Yes.

Q. What does your — obviously this is not a direct quote from the tape, because of its garbled nature, is that correct?

A. Yeah.

Q. Did you then — what was your purpose in your putting the quote, unquote, "gist of the conversation"? Why did you, rather than saying, "I can't hear the tape," why did you feel it appropriate to put the gist of this particular conversation?

A. Well, because there was something coming through on the tape and it was fresh in my memory, so I just put it (85) in.

Q. Were you taking any notes to supplement what was going on with respect to these tapes?

A. No, I was not.

Q. But you had a fresh recollection of what had occurred, at least at page nine, and you so you felt

because of that fresh recollection and because of your ability to hear certain portions of the tape you could at least give the gist, is that correct?

A. Yes.

Q. In fact, Miss Gadomski, how long after this particular interview was it that you set about doing this transcription?

A. I started it the same day.

Q. The same day?

A. Yes.

Q. And I take it that you were out at the Metro Airport, did you at all times have physical custody of these tapes from the time that they were — that everybody stood up at whatever point it was and left the room?

A. Yes.

Q. And you went back to the office?

A. That's right.

Q. Were you accompanied by Mr. Wendland when he went back to the office?

(86) A. I believe so, I'm not —

Q. How far —

A. — sure at this point.

Q. Excuse me. How far on the first day did you get with the transcribing?

A. I can't remember that. I think I did a good portion that day.

Q. All right. What did you do with the tape recorders?

A. They were just there in the department.

Q. What ever happened —

A. In the office.

Q. You don't have any idea what happened to those tape recorders?

A. No, I don't.

Q. You get back to the office, along with Mr. Wendland, and did Mr. Wendland transcribe page 11 that first day, that same day?

A. Yes.

Q. You go back to the office — let's — . You get back to the office and you're in the process of playing and transcribing the tapes, and you hit the start button, correct?

A. Uh-huh.

Q. Did you hit — the tape was on, correct?

A. Yes.

(87) Q. Can you explain to me what that other clicking sound I just heard is? The tape is on now, correct — that I just played?

A. I didn't hear it.

Q. Tell me when you hear the tape come on. Now?

A. Yes, I guess so.

Q. All right. Before the loud, squeaky noise —

A. Uh-huh.

Q. — you heard a clash?

A. Uh-huh.

Q. Do you know what that click is after the tape recorder is turned on but before the click is heard —

A. No, I don't.

Q. — can you explain to me what that click is?

A. No, I can't.

Q. All right. At some point in time that day, did you learn that you couldn't hear virtually one third — in fact it was even more than a third of the interview, greater than a third of the interview in significant part? The first side of the first tape of your interview is garbled in a significant part, is it not?

A. The first side is garbled to some extent, yes. I don't know whether it's one third of the whole interview or not.

Q. Did you take the tape recorder to maintenance and say, (88) "What the heck happened with this tape recorder? I can't use this piece of junk." Did you do that?

A. No, I didn't.

Q. You put the tape recorder back in the bottom drawer and left it there for the next reporter I take it, correct?

A. No, I just left it in the office with us.

Q. Never took it to maintenance, never did a darned thing with that tape recorder, right?

A. No.

Q. Did Mr. Wendland, to your knowledge?

A. No.

Q. You were in charge of this tape recorder, right?

A. I was sort of in charge of it, yes.

Q. Between you and Mr. Wendland you were in charge of it?

A. That was really not the express purpose of my being there. I —

Q. Well, I didn't —

A. — went to the interview to be at the interview.

Q. I didn't mean to imply otherwise, ma'am. I'm sorry if I gave you that impression. One of the functions that you had as part of the learning experience, if you will, that you were going through was you had to carry the tape recorder?

A. Uh-huh.

Q. Right?

(89) A. Yes.

Q. And it's because you were going to transcribe the tapes at the end of the day or during the day, you had to take the tape recorders back, right?

A. Well, I didn't know that at the time.

Q. Well, you sure found out?

A. I sure found out when we got back.

Q. When everybody stood up and you were — everybody was leaving and you were the one with the tape recorder, right?

A. That's right.

Q. In any event, did you ask anybody from maintenance to come take a look?

MR. STEWART: I'm going to object to that one as asked and answered, your Honor.

MR. KENNEY: No, I think I asked if she asked — did you ask anybody to come take a — to do it for you, "Take this to" —

MR. STEWART: That's asked and answered, your Honor.

THE COURT: I'll sustain the objection. This is really just argument at this point. She did nothing — you did nothing with the tape recorder, right?

THE WITNESS: I did not.

MR. KENNEY: Okay.

(90) THE COURT: So we can ask questions forever then about what she didn't do. She did nothing with it.

MR. KENNEY: All right. Judge, I'm sorry.

BY MR. KENNEY:

Q. The first coffee break that is depicted in your transcript — and I believe it's at page three — you knew, Ms. Gadomski, that you had had another tape recorder present at the interview, correct?

A. That's right.

Q. And that you were taking the tape from that particular tape recorder and you didn't bring that, the second tape, or the tape recording from the second tape recorder, back with you, did you?

A. No.

Q. You gave that to Mr. Tetzlaff?

A. Correct.

Q. Correct?

A. Yes.

Q. Well, you knew that when you got back to the office that side one is garbled?

A. Uh-huh.

Q. Right?

A. Yes.

Q. You knew that there was another copy of that recording (91) out there?

A. Yes.

Q. Did you call Mr. Tetzlaff and say, "I can't make head nor tails of this first side. Can you send me the tape or make a copy of it and send it back to me?"?

A. No, I didn't think it was necessary.

Q. Let's go back to the coffee break. That portion of the coffee break is actually recorded and we could listen to it, because that's the part where Mr. I think it was Locricchio asks you, makes some joking remark about you being in the room with four other men or three other men — do you recall that?

A. I think that was Mr. Tetzlaff.

Q. Mr. Tetzlaff — and that part was recorded, correct?

A. Uh-huh.

Q. Isn't it a fact that shortly thereafter on this very same portion that there is a relatively long three or four minutes of conversation by Mr. Locricchio about the Allen Industry project and how he first got started, and that is nowhere to be found on this particular tape?

A. That' possible.

Q. Well, why, if you did it the same day and you had already put the gist of some things in, did you leave the gist of that particular conversation out?

(92) A. I don't know. I guess I didn't think it was important to the story.

* * *

FROM TRANSCRIPT VOLUME XII:

STIPULATION

(20) * * * MR. KENNEY: Your Honor, I believe we have entered into a stipulation that the tape recording

that (21) was provided to Mr. Tetzlaff on April 10th, 1979 was technically flawed and is blank, and I believe that's been stipulated to by Mr. Rassel and Mr. Stewart.

MR. RASSEL: Your Honor, that was the representation made to us as to the quality of that tape, and we stipulated that that was accurate. Proofs need not be adduced as to that.

THE COURT: All right. You may step down.

A stipulation, members of the Jury is an agreement between the parties as to a matter which might otherwise be in controversy. When there is a stipulation you may treat those matters as though they had been conclusively proven. In this case both parties are stipulating that the tape that was in the possession of Mr. Francell and Mr. Locricchio was in fact incapable of being transcribed and I guess is totally blank, is that correct?

* * *

FROM TRANSCRIPT VOLUME XII:

TESTIMONY OF PLAINTIFF JOSEPH J. LOCRICCHIO

* * *

(31) * * * Q. When did you first meet Gary Francell?

A. When I first came to Lakeview High School from Notre Dame, I believe I was about 16 — about 17 years old.

Q. And had you maintained a social relationship to Mr. Francell from that time up until the time that he became associated with J & J?

A. Yes, we were very close.

Q. How did it happen that Mr. Francell — or did you invite Mr. Francell to join you in J & J?

A. Yes, I did. I had found a piece of land in Troy that I felt was — see, for the year after Joe Brennan left I

worked for a company called Simone Corporation, was owned by Armand Simone of the — he's in-laws to, his wife is Manoogian. Armand had quite extensive expertise in the build-for-lease industrial end of the industry, and taught me by just the fact I'm associated with the jobs, with his management I learned the business from Armand.

It intrigued me, it was new. H.F. Campbell was doing it, Simone was doing it, they were the only two in the city that were doing it, actually spec'ing buildings for leasing. So when you build a building on spec, you gamble that that building will be occupied — well, Detroit had at that time a shortage of small (32) industrial plants and Armand knew that and he had gone into construction of those in advance in anticipation that he would get tenants. It was working very well for him. It intrigued me.

I found an area that I felt was really going to be a growth area, and that was Troy, and I needed dollars to buy the land in Troy, and Gary and I were very close together. I knew he had some money his father left him when he died, he had $30,000. I went to Gary first, and as a matter of fact I met him driving his meat truck down Harper Avenue one day and I'm thinking about this land and I saw Gary's truck and he blew the horn, pulled over and he said, "Let's get a cup of coffee," and I said okay.

So I said, "I was going to come and get you anyway, I need that $30,000, I got a deal if you like it." So he — in fact that day he finished his meat route and met myself, and he and I went out to look at the land out in Troy.

Q. Let me stop you right there. You indicated that you were doing work for the Simone Corporation?

A. Uh-huh.

Q. Was this as part of a contract that Simone Corporation had undertaken with J & J?

A. Yes, we were sub-contractor for Armand.

(33) Q. So you were not a direct employee of Simone Corporation at that time?

A. No, I was not, but I did all of their utility work, their repairs plus their concrete, plus their masonry, their footings and their site work. I expanded into that at those areas after Mr. Brennan left, and so I was pretty much in constant contact with the sales department, with the — we issued all the changes or adds or deletes on a building with Leonard Silber, who was the general manager and chief executive of Armand Simone, and even the contact with Armand himself because of my intense involvement in the sub-contracts.

Q. You indicated that you would do what you termed would be "site work"?

A. Yes.

Q. Would you tell the members of the Jury who might not be in the construction business what you mean when you say "site work"?

A. Well, it's the preparation of the land under the appurtenances and building that are proposed to be built. If you move out to a site and there's trees in the way, there's undulation of the grade, where flatness has to be achieved, that's site preparation. You flatten out the grading.

Q. You do that with bulldozers and graders and — -

(34) A. Various equipment, but bulldozers, graders, backhoes.

Q. Were you ever called upon, Mr. Locricchio, to operate that heavy machinery during the course of your tenure with J & J?

A. Certainly, I operated all of them.

Q. How did you learn to operate that type of heavy equipment?

A. From my grandfather and my uncles. They had a business called Furneri, F-u-r-n-e-r-i, Underground. My

grandfather started the business in I believe it was in 1910 when he came over, in 1915.

Q. You were telling us about how it was that you and Mr. Francell became associated in business, and I believe that you were about to tell us that you and Mr. Francell went out to the land site that you proposed to buy with the assistance of Mr. Francell's money, is that correct?

A. That's correct.

Q. Where was that piece of land located?

A. On 14 Mile between Dequindre and John R.

Q. How had you learned of that particular piece of land, if you remember?

A. I — well, I sought it out. I selected first the area, north Oakland County, and Troy — that's what I felt would be a growth area, and then within that I sought (35) out what I felt I could economically maintain and wasn't too large, yet wasn't too small. And so 20 acres fit very well.

Q. And did you ultimately buy that piece of land that you and Mr. Francell went out to look at?

A. Yes, we bought the piece of land.

Q. And approximately when was that piece of land purchased?

A. About 1964.

* * *

(47) * * * Q. When is the next time after you completed the industrial park out in Troy that you had occasion to become involved in any other developments?

A. There was a piece of land that was — a very, very desirable piece of land near us on 15 Mile and Stephenson Highway. It was owned at one time by Jim Robbins of Robbins Corporation and was sold ultimately to Fruehauf for construction of a new truck body plant. It was 100 acres in size.

Fruehauf decided not to relocate from the city of Detroit, stayed down on Charlevoix Avenue I believe that's where they were. And the property never really went back on the market, but it was known that if you had the right deal, and I guess it was a lot of people trying — you know — approaching Freuhauf [*sic*] with deals, if you had the right deal that you might be able to buy the land.

The property I thought was one of the finest properties in north Oakland County. And I approached (48) Gary about it in our retirement state, he — after some discussion he said let's go for it, let's give it a try. So we went to Bill Grace, who was the president of Fruehauf Corporation, I got a meeting through a broker named Mel Lake, who had arranged the meeting.

I sat down with Mr. Grace and he was a, quite a negotiator. He said to me, "I've had many men come in front of me and want this piece of land. Here's what you do, no deals" — because first I tried to talk to him about a land contract, see if I could get some sort of purchase leverage from him. He says, "I tell you what you do if you want this piece of land. I want two million dollars for it, put up $50,000, I'll give you 90 days to raise the $2 million. You come back with the $2 million, you get the land. If you don't, I get your $50,000." So Gary and I discussed it, I agreed, we got $50,000 together, and we felt that we had 90 days, which was an adequate amount of time to put constructing financing packages together for the grading and roads and everything, and put projections together for the final buy of the land on industrial lease out like we had in the first instance.

And we had a track record, we were well known in Troy, and although I knew it was too big a deal at the time for the Troy National Bank to handle, I felt I (49) could get some other large banks in the city or some national lender to take the loan.

Q. All right. Let me stop you right there. How did you get the $50,000 together?

A. Well, we had the money at the time. The $50,000, I don't know exactly where it came from, but it was probably out of what Mr. Francell and I had in our little retirement fund, I don't know.

Q. All right. And did you ultimately get the $2 million loan that you needed to acquire the piece of property at 15 and Stephenson?

A. We got four commitments for the loan and selected the one we felt was the most advantageous and offered us the most latitude, and that was the Teachers Insurance and Annuity Association out of New York. I also had a mortgage commitment from Commonwealth Bank, another one from Ford Motor Credit, another one from New England Life.

* * *

(52) * * * Q. . . . And you ultimately got the financing in order to purchase that piece of property I take it?

A. Yes, we selected the Teachers loan.

Q. All right. What — and did you begin to build on that piece of property?

A. Yes, we did.

Q. Now when did that start?

A. I can't remember exactly when the Teachers loan was closed, but I think somewhere in the neighborhood of 1968 maybe.

Q. What — and I take it that based on your proposals you in fact began to build on that property, right?

A. Industrial buildings, and ultimately a hotel. Some of the industrial buildings were for — we either built or sold the land for — were Wilson Sporting Goods, which was William Temple Boat Corporation, Dupont built a small plant there. We had a lamp manufacturing plant,

MTP, we had our office building on the site, which we leased additional space in — about 50 percent we occupied and 50 percent someone else leased.

Beacon's moved in the storage, and then ultimately I negotiated a deal with Barron Hilton and Stanley Zaks of, Hilton Corporation to build the Troy Hilton Inn on the very corner of the site. And also we (53) had a sale of land, the corner, the 200 feet on the either side of the corner tangents were sold to Sun Oil Company.

Q. When was the deal for the Hilton negotiated?

A. I believe it was somewhere in '68, late '68, early '69. Somewhere in that area.

Q. And what was Indusco called upon to do in relation this Hilton Hotel?

A. Well, we were to own the hotel. We had a commitment from Hilton, I went to New York and met with — in fact, that day — and I didn't get a chance to meet Conrad Hilton, but I met Barron Hilton and Stanley Zaks in their offices in the Waldorf Astoria in New York, and explained to them that I thought I had an extremely good location for a Hilton Inn.

The only involvement Hilton had in the City at the time or in the metropolitan area was the old Detroit Hilton Hotel, and they were interested and said they would come and take a look.

I — it was a couple weeks later, I had thought that maybe they were being gracious and just letting me go down the road, because I didn't hear anything from them for a couple of weeks, and one day I walked into my office, which was on the site, and the secretary gave me a little note that Mr. Zaks had just (54) stopped in and he said, "Get together with a Vernon, call this number, talk to Vernon, get this thing started and then give me a call."

That was his note. What he had alluded to was Vernon Herdon, who was one of the executive vice pres-

idents of the Hilton Corporation. So we started to put it together, we were the owners, or the owners in its inception, in any event. We sold it before we completed construction. Ford Motor Credit was the initial financier.

Q. You were to — were you also going to be involved in the actual construction of that hotel as well?

A. Yes, we were going to build it, and not only that, we had the franchise in Oakland County, the Hilton Hotels. Hilton — after we negotiated our initial deal they said we need a mover, we want to get placed in Oakland County and they gave me the franchise to construct all the Hiltons and the protection for all the Hiltons in Oakland County.

Q. When you say "we" are you talking about you and Mr. Francell and your company Indusco, or —

A. Yes.

Q. — someone else?

A. No, myself and Mr. Francell.

Q. And was the construction of that particular hotel on 15 (55) Mile and Stephenson begun?

A. Yes, it was.

Q. You indicated that before the completion of the hotel, you — meaning, I presume meaning Indusco — sold your interest in it, is that correct?

A. That is correct.

Q. Approximately when was that?

A. In about 1969 we agreed to sell.

Q. Why — what circumstances prompted you to sell your interest in this hotel complex that you were building?

A. I had found Pine Knob. I was introduced to Pine Knob on an overall basis — I used to ski there when I was a very young man. I started to ski at Pine Knob, and I knew Pine Knob and I wasn't — from the ski area that was there I wasn't really impressed.

But one day a friend of mine named Paul Bosco came to me and he was doing some earth moving work, cleaning up the hills at Pine Knob. The sand had eroded and come down into their pump house, and they had to use large equipment to get the sand out of the pump house around the generators that were there. So Paul had a work crew out there, and he said come on out, and he was working on my job on the Hilton site, and he said come on out and take a look at this."

So I went out and I looked at the land and at (56) first was disinterested in taking a look at Pine Knob because I had been there before, but I had never really seen it from the scope that he showed me. He took me up in the old mansion and showed me what was truly Pine Knob, the estate of Colonel Sidney Walden. He showed me the old state manor home and the half-way house and all the things, and this beautiful rolling land.

And I just fell in love with the property, and came back, told Gary about it. We were enjoying some success at the time, and we had leased a lot of our large industrial buildings and sold off major tracts and had just sold a site to someone for $250,000, we had just sold a large piece to Dupont for a couple hundred thousand dollars. We had our Wilson Sporting Goods leases, our MTP leases generating income for us, and we were enjoying the success and we had the Hilton Hotel off the ground, and I felt that it was a time —

MR. RASSEL: Objection, your Honor. I realize that we're getting a narrative here, but I'd kind of like to know where this is going. I don't know that any of this is in response to the question, and if we can proceed in a question and answer format I think think it would be more proper. The witness is just continuing on down the path here that I don't (57) necessarily know is in answer to a question.

THE COURT: As to general background material I think a narrative is appropriate, but I think you're getting closer to the subject of the case and you better proceed on a question and answer basis.

BY MR. KENNEY:

Q. All right. You — let me back up then. The sale of the Hilton was prompted by your desire to purchase Pine Knob, correct?

A. That's correct.

Q. You used the sale of the Hilton as part of the finance purchase of —

MR. RASSEL: Objection, your Honor, this is leading.

THE COURT: I — it is leading, but I think he's directing his attention to an area, so I'll allow it.

MR. KENNEY: That's right, that's the last one.

BY MR. KENNEY:

Q. Is that right?

A. Would you ask the question again, please?

Q. Sure — I'm sorry. You sold your interest in Hilton to finance your purchase of Pine Knob, correct?

A. That's correct.

(58) Q. All right. After you had been to the Pine Knob area with Mr. Bosco and were interested in purchasing Pine Knob, whom did you first contact about that purchase — and again, I want to just just caution you in view of Mr. Rassel's objection, which is perhaps well-founded — if you could keep your answers short, and we'll just walk you through it, okay? From — whom did you first contact in order to initiate — strike that. Did you ultimately purchase the area known as Pine Knob?

A. Yes, I did.

Q. All right. After you had been out to the site with Mr. Bosco and made the decision to purchase — or

exhibited an interest in Pine Knob, whom did you first contact in order to get the ball rolling, so to speak?

A. Dr. Harley Robinson, and the man that assisted Dr. Robinson, his name was James Albright, who handled all of Dr. Robinson's financial affairs.

Q. How did you know to go to Dr. Harley Robinson? How did you find out that that was the person?

A. He was the owner of the estate.

Q. When you went to Dr. Robinson, did you learn how much — perhaps you can help us out with this board. Does Exhibit Two, which is a blow up, would that assist you in at least pointing out the areas of the purchase that you made in terms of Pine Knob?

(59) A. Yes. Do you want me to step down?

Q. In a moment.

MR. RASSEL: Are you going to offer this exhibit in evidence at this time?

MR. KENNEY: Not right at this time.

BY MR. KENNEY:

Q. Does it —

MR. RASSEL: Why are we displaying it?

MR. KENNEY: Because it's been displayed four times, and I want to ask him something.

MR. RASSEL: Are we going to offer it?

MR. KENNEY: I'm sure I'll offer it.

THE COURT: What exhibit is this, what number?

MR. KENNEY: Two.

THE COURT: All right, any objection?

MR. RASSEL: No, your Honor.

THE COURT: All right. It will be received.

BY MR. KENNEY:

Q. Would this assist you in describing at least — and let me back up a minute. There are things on Exhibit Two that were not there when you first went out

to Pine Knob and spoke to Dr. Robinson, is that correct?

A. That's correct.

Q. Would this exhibit at least assist you in depicting to (60) the Jury the land that you were interested in purchasing from Dr. Robinson?

A. Yes.

Q. Could you come down here and — I even have a pointer for you (handing it to the witness as he comes down). Would you point out to the Jury the area of land that you first wished to purchase from Dr. Robinson?

A. These roads (indicating) denote the periphery of today what is Pine Knob. This is — these roads right here. At the time I purchased from Harley Robinson the property, Harley owned everything on here except this portion, this 40-acre line would denote this, this slice right down in through here (indicating).

Harley did not own that, that was owned by another farmer in the area, Mr. Birds — excuse me — Beardsley. And this one was owned by a farming — these were two farms that were adjacent to the existing Pine Knob estate. So inside the quadrant, we tried to achieve the acquisition of all of this.

The ski resort was there and had two chair lifts. This was the highest hill at Pine Knob, which is now the smallest hill at Pine Knob, and there was a chair lift there.

Q. I wonder if all — we've got the reporter, and if everyone can see — .

(61) THE COURT: Well, there is another problem, I don't know if it really is a problem. I know that you're indicating on the blow up, Exhibit Two-A. But it doesn't really reflect on the record what you're pointing to when you say "there".

MR. KENNEY: Okay.

THE COURT: If we could just have the record reflect that he is indicating on a blow up of a photograph taken from a helicopter.

BY MR. KENNEY:

Q. I wonder perhaps, Mr. Locricchio, if you could with the aid of this marker and maybe a chair at least point out the area that Dr. Robinson owned. If you could draw that in in black?

A. (He does.) This line right here (indicating). Approximately 440 acres.

Q. Now you also indicated that there is a ski hill. Could you circle or — let's see how we could do this.

A. I could just make a circle around the ski area.

Q. Make a circle around the ski area that Dr. Robinson did not own?

A. Well, that Dr. Robinson did not own?

Q. Right.

A. That's all.

Q. All right. And could you —

(62) A. And a piece of this part — well, this small part right in here. See, this is the area right in here.

Q. All right. You have in a circular fashion put a circle around the ski area that at the time that you went to purchase Pine Knob Dr. Robinson did not own, correct?

A. The only thing he didn't own was the 14 acres under this area right in here. The Pine Knob Ski Resort, Inc. or Pine Knob Ski — I believe Ski Resort, Inc. — owned this as B-type 14 acres. The rest of it they leased from Dr. Robinson, the rest of these hills up until that time. That was this much here (indicating). This was under lease. About this much of the area was under lease. That was the leased area.

Q. You've put marks around the area of the lease, correct?

A. Uh-huh.

Q. All right. Before you met with Dr. Robinson, did you know who it was that owned the circled portion that you circled?

A. No, I just knew it as Pine Knob Ski Resort, you know, what Mr. Bosco had informed me.

Q. All right. Did you then after meeting, first meeting with Dr. Robinson begin the negotiations for the purchase of the 400 acres that you've outlined for us?

A. Yes.

Q. When did you begin the negotiations for that particular (63) purchase, approximately?

A. Somewhere in 1969.

Q. Did you also attempt to purchase the circled area, that is, the 14 acres of ski area, at some point?

A. I discussed the acquisition of the ski area briefly with Gary in the beginning, and we had decided that the ski area was an asset to the overall community that we were going to plan there, because it was recreational oriented. But we would prefer not to own the ski resort and let them, let the operators who were there operate it, but maybe on an upgraded basis.

We were going to be their landlords and we had hoped that we could go to them and show them what we were going to do and make them invest a little money and a little more time, a little more effort into making Pine Knob what we felt it could have been. So we really didn't have any designs on acquiring the ski resort right away, no.

Q. All right. What was your thought in terms — or what designs, as you've termed it, did you have for the acreage that you did negotiate to purchase initially from Dr. Robinson?

A. We had a $60 million project put together for Pine Knob. It involved 1,000 condominium units, a hotel that was to sit adjacent to and be utilized in (64) con-

junction with the ski area, and sit adjacent to it. A summer music theater, and a golf course, and certain restaurants and out properties and some multiple dwellings, rental units.

Q. When did you and how was the 400 acres that you ultimately purchased — how was that in terms of Dr. Robinson, how was that financed initially?

A. Through a land contract from Harley Robinson.

Q. Did you have to put money down?

A. Yes, we did.

Q. Do you recall approximately how much you put down on that?

A. I don't remember exactly. I remember I think we reduced the land contract from $1,550,000, and we also gave him a building to make a late payment of $165,000. He assumed the equity in our office building that I had told you earlier that we had built on our Indusco park near the Hilton.

* * *

(106) * * * Q. I want to ask you some questions about the Magill loan. Would you tell the members of the Jury how the Magill loan, the loan itself, came to be, what transpired that led up to that moment?

A. The construction or reclamation of the ski hills at Pine Knob got to be a bigger job than Gary and I had anticipated. When you scrape up dirt and you cut a large section — it's called a cut and fill — you balance that cut and fill, and you calculate how many yards you'll use. And we had determined that our maximum debt we could reach before hitting the aqua floor. What we wanted to do was build a high hill, first of all. We wanted to build the highest hill around, because that would be, we'd have the best skiers there. Ski resorts are all relative to length of run, height of hill. So we made a deal with Adele and Paul to come on out on a periodic basis, because we didn't —

Q. You say — let me, just so we that — we've heard these (107) names I'm sure, but just so that I, the Jury and I get it straight, when you say "We made a deal with Adele and Paul," who are you talking about?

A. I'm sorry. B and V Construction, Bosco and Volpe.

Q. All right, Adele and —

A. Adele being Volpe's side, Bosco being the B side.

Q. Okay.

A. Anyway, when we contracted — contacted them to come out and take a look at what we wanted to do, Gary and I had enough dollars to do what we thought we could. Supposedly felt we would encounter an aqua floor about 16 feet on the up grade. But we didn't encounter that aqua floor.

It was at our election, we had told them to continue on until they hit the aqua floor, and bridge — leave enough bridge for the aqua floor so that we wouldn't have ground water, seepage coming back up and then stop, and that would be a high hill.

So they went down according to orders and not according to our anticipated 14 feet. So we had paid them all our dollars out that we had, and we needed to meet some obligations, mortgage obligations, some additional dollars. I had gone back to Adele and asked him for the money because I knew he had gotten the bulk of our money. What they had done was recently buy a (108) lot of equipment.

Adele didn't have the dollars available, and I had helped Adele many times and this was a big job and he — you know, we were close, so he said to me, "I haven't got it and I hate to say no to you. Give me a little while and let me see if I can get the dollars." Adele called me back, he told me about Bill Magill, who was a long-time friend, in fact, he was a next door neighbor.

Q. Long-time friend friend of Mr. Volpe?

A. Long-time friend of Mr. Magill, Mr. Volpe was.

Q. Right.

A. He said to me —

Q. He who, just so we are —

A. Adele —

Q. — straight, who's he now?

A. — Adele Volpe said to me that he had spoken to Mr. Magill, Mr. Magill had given Adele the money to build his home, and Adele had — a long time before he had lent Bill some money, so they had a very close relationship.

In fact, what they did was build homes next door to each other, and used the same floor plan, changed the houses a little bit. And they were extremely close together, so he went to Bill and said, (109) "I've got this friend of mine who needs some money and I hate to say no to him right now, and I'll give you my word that you'll get your money back. Don't worry about it, I'll pay you back, regardless of what happens with Joe."

They knew a little bit about me and Pine Knob through Adele before that, but I had never formally met them. They told Adele, "If you need some money, come and get it. We've got $200,000 put away," and that's what Adele had asked them for and they yes, they would let me have that, and I could come over.

But they didn't want anybody to know they had that kind of money, and they kept their money — they had just had a tax audit — and they kept their money in a safe deposit box. They had just paid the government $500,000 — I don't remember the exact numbers, but I think it was close to half a million dollars — settlement in an audit.

So Magill said, "I'll give your friends the money, but I want my family and my daughter protected. I don't want anybody coming after my daughter or I don't want to jeopardize the safety of my family, I don't want people to know I have that kind of money."

So Adele came to me and he said, "Joe, he'll give it to you, but he doesn't want anyone to know (110) where it's coming from." And I said, "Adele, why?" And he explained the whole situation, and I asked him, I said, "Is there any

problem with taxes?" And he told me, said, "Joe, they just went through an audit, cleared them all out."

They paid, they didn't even dispute the audit, they paid it. They were just upset about it, they were mad at the government, they paid their money and they said that was it, they weren't going to spend more money and they had this money put away. And what was left was this $250,000. There was a very successful business, he had accrued a lot cash, and he had about $750,000, but after the government finished with him he had about $250,000 left in his savings.

I said to Adele, "I don't know if I can take that money, I've got to find out if that's legal. How can I do that?" So Freddy, who had —

Q. Freddy — now who is he, Freddy?

A. Excuse me, I'm sorry. Fred Gordon was an attorney who Gary Francell and I had met quite some time earlier. He was a very dynamic man. You know, he was just a production man who, when you put a loan package together, you could jumble it up any way, shape or form — Freddy would come up with a good package for it. I mean, I said he wrote the book on limited partners, and (111) I sincerely mean that. I honestly believe that he did get a book published with Rand McNally all about limited partnerships.

But then Freddy was a respected man in the Jewish community, and they had brought investment dollars to him and he had placed small loans with Gary and myself. I would call Freddy up and say, "Fred, do you know anyone who has $100,000, I need it for 90 days," and he'd say, "Dr. —Callan, Dr. Shapiro, or this one or that will give you the money through our PC. You pay us interest and that's it."

So we had a good track record, and we got closer and closer and closer with Fred, who was originally supposed to be our tax attorney. He was more an entrepreneur than anything else. He got involved with us in even the packaging up of the loans to Teachers, and things like that.

He's the one who we went to to find out about if it was legal to make this deal with Magills, which he said —

Q. "He" again meaning Fred Gordon?

A. Exactly.

Q. All right.

A. He said to us that the money could be utilized as collateral for a loan. He had a friend with a mortgage (112) company, his name was Joe Burnett. He lived, resided and had his business in Toronto, Canada. "I'll call Joe. He owns INA Mortgage, I believe, Kilborne Management, one of the divisions of INA," and he said "he's one of the biggest mortgage brokers in Toronto. Let me see if he'll build it for us."

So Fred had to explain to Burnett the whole deal, but Burnett believed Freddy when he told him what it was, and he said, "I have this $200,000 and we'll bring it to you. We'll make sure it's all in negotiable funds, you collateralize it. You collateralize your loan and make us a loan, we'll pay you a certain amount of interest."

I don't remember if he offered him over the phone a fee for it — anyway, they worked that out later on. I really wasn't — in the final instance I wasn't there. I missed the plane that day and Gary and Fred had gone and made the final deal, so I don't know exactly the final things. But anyway, Burnett agreed to do it.

Q. Had you ever met Joseph Burnett — have you ever met Joseph Burnett?

A. No, not even to today, I have not — still not met Joe.

Q. Ever met a guy named John Pullman?

A. Never.

(113) Q. How about Meyer Lansky, do you know Meyer Lansky?

A. No.

Q. Did you set up — strike that. Were you the one who suggested Joseph Burnett?

A. No, I had no knowledge of Joe Burnett. Fred Gordon said he knew him through the INA Mortgage Company.

Q. Did you know that Joseph Burnett knew John Pullman?

A. No, Mr. Kenney, I have no way of knowing that.

Q. Did you know that Joseph Burnett knew John Pullman, who knew Meyer Lansky?

A. No, no, no.

Q. By the way, just to clear this up before we go too much longer, are you a member of the mafia, Mr. Locricchio?

A. No, Mr. Kenney.

Q. Ever been a member of organized crime?

A. No, Mr. Kenney. No.

Q. Did you get — ultimately get the loan after the transaction took place in Toronto, did you get the $200,000?

A. Yes.

Q. And did you, as part of — strike that. Whose — at whose suggestion was it that the $200,000 not be divulged to anyone, the original source of that $200,000? Whose idea was that?

A. Mr. William Magill.

(114) Q. Did you give Mr. Magill any type of security for the $200,000 loan that was ultimately obtained?

A. Yes.

Q. What was given as collateral or security for that loan?

A. Quit claim deed, that transferred all of my and Gary's interest in and to Pine Knob to Mr. Magill. As security for the loan — I didn't transfer for the $200,000. I gave it as security for the loan only.

Q. Whose idea was it to prepare the quit claim deed?

A. It was myself and Mr. Francell.

Q. Did Mr. Magill ask you for any security for that loan?

A. No, he had Mr. Adele Volpe's guarantee on it, and he told me that was enough. He didn't want anything, he didn't want — .

* * *

(153) * * * Q. There are certain inaudible parts contained within either or both of the exhibits, correct?

A. That's correct.

Q. Do you recall what was being discussed during these inaudible portions?

A. Yes, I do.

Q. How did the interview start?

A. We went into the room, and Mr. Wendland started out with asking Mr. Francell and myself how we got together, and I answered the question and just never stopped.

Q. Were you ever asked about rumors of your alleged Mafia involvement?

A. Yes, he wanted to know about the rumors on the street, how they started.

Q. And that was asked during the course of the initial portions of this interview?

A. Yeah — "What about the rumors that are out there? (154) Yes, that was in the beginning, in the very beginning.

Q. While you were in the room that we've just described, correct?

A. That's correct.

Q. What did you tell Mr. Wendland back on April the 10th of 1979, how the rumors got started?

A. I said that the rumors started with an article written by the Detroit News that was written by Pete Waldmeir, and I quoted the line, I said, "You will get various estimates as to how much Pine Knob cost, $2 and a half million, $5 million, and you will also get various guesses as to who owns Pine Knob, Locricchio and Francell and certain others unnamed," and I told them unequivocally that my whole life changed after that sentence started.

My attorney called me the next morning, irate, that I had at least, at least 25 phone calls that day from people

questioning me as to who the other owners of Pine Knob were. My attorney, Mr. Marcus, requested I go to a meeting with Mr. Hayden, who was an acquaintance of his, to clear up any doubts that they might have.

And he said, "I know" — he told Mr. Hayden that he knew me from the day I started in business. He saw me in the trenches, laying the sewer pipes, and he (155) knew where I came from. He was responsible for a lot of the dollars that I generated to start in business.

So Oscar Marcus acted as more than an attorney to represent me, he acted as a confidante who knew where I was coming from and, like Mr. Wendland characterized, he told Mr. Hayden at the meeting that I was a fine, upstanding man. He did in so many words say that, yes, he did, because he knew where I came from.

Q. And you told Mr. Wendland that?

A. I told Mr. Waldmeir that, and I told Mr. Wendland that that day of the meeting. That's how I started my — to clarify any question in his mind as to why I had these problems. Because I was still — he had still gotten my letter and he — that letter meant what I said, and I clarified that at the offset, that "If you defame me today like you did in the past" — that's where those rumors started. I let him know for sure.

Q. Is that anywhere to be found —

A. No.

Q. — on the transcript?

A. No, it's in that section that's all garbled, evidently.

Q. Is that anywhere to be found on the tapes that you —

A. No.

Q. — listened to?

(156) A. No. Mr. Kenney, in the back of the transcript — please let me back up one minute. You said —

MR. RASSEL: Is there question pending, your Honor? I have no idea where the witness is going with this.

THE COURT: Well, I think he is going to continue his response to, "Does it appear anywhere in the tapes that you know of?" It sounds like something came to his attention. So that question was the last one.

MR. KENNEY: Let me — I'll ask the question so we'll clear that up.

BY MR. KENNEY:

Q. Is there someplace in the transcript where a reference is made to Mr. Waldmeir?

A. In the back of the transcript. I don't know exactly on what page, but I can tell them about — I said, "You know when I was at that meeting with Waldmeir and Hayden," but it was just like a sentence that was thrown in. But it appears in here, and yet we don't find anything about the meeting I'm talking about. Yet everywhere else since I clarify everything I say. The meeting isn't discussed.

Q. So there is a reference in the transcript to a —

A. Yes.

(157) Q. — meeting? So it's —

A. It's about the meeting that I mentioned Hayden and Waldmeir.

Q. Your detailed discussion concerning your feelings about the initial Mr. Waldmeir article —

A. Right.

Q. — or column in 1972 —

A. Right.

Q. — is not found, correct?

A. No. That's correct.

Q. In the portion of the transcript — and you will recall that I asked Miss Gadomski about that and I believe it's found on page 14. From your recollection of the April 10th, 1979 meeting, is this an accurate either trans — is that an accurate transcription of the question that was asked at that point in time?

A. No. From the tapes it's not an accurate transcription of the question.

Q. Were you in fact asked a question at some point in that interview by Mr. Wendland about the initial FBI contact?

A. Yes, I was questioned by Mr. Wendland about when the FBI first got involved with us. And I don't know of the exact verbiage of it.

Q. Was it in the context of what we were discussing with (158) this particular, in this particular area?

A. No, here I'm discussing the loan of Michigan National Bank and supposedly Mr. Wendland says, "How did all the problems start with the FBI?" That is not on the transcript, and my answer never would have been what's written.

Q. You mean that's not on the tape?

A. That's not on the tape — excuse me — and my answer never would have been what's written.

Q. All right. If you were asked — and were you asked — "How did all your problems" — or words to that effect, by Mr. Wendland, "How did all your problems start with the FBI?" — were you asked a question similar to that at some point in that interview?

A. Yes, I was.

Q. And what did you tell Mr. Wendland when he asked you that particular question?

A. In August of 1972, sometime after Mr. Waldmeir had written his article, about two or three months after, or four months, I was visited by a man named Jerry Bassel, who was a FBI agent. That was in the Pontiac office, but he got his directive from Detroit. Because I asked him, I said, "Why are you here? I've never been asked any questions about anything in my life with the police, I've never been involved with the police," (159) and especially the FBI with the new, shiny badge that says special agent, and I've never seen anything like

that. So I said, "Then why are you here, what do you want to talk to me?" He said, "The street rumors have started" —

MR. RASSEL: Objection, hearsay, your Honor.

MR. KENNEY: It's certainly not hearsay, I'm asking Mr. —

THE COURT: Well, no, this is what he has indicated he was asked and he told him on the tape, as I understand it, is that correct?

MR. KENNEY: Yes, that's correct.

THE COURT: That's over-ruled.

THE WITNESS: So I told Mr. Bassel, I asked Mr. Bassel why he was here to talk to me. I had never in the past — I'd done a lot of things, I had never — relative to business and everything, others — my life wasn't changed. Why did he come to talk to me? He said that "There were rumors on the streets that the mob was involved, and there was that article in the Detroit News and I want to talk to you about that," you know. He didn't say — "He said that other people owned this place than you, and I want to clear that up, and there was the article in the Detroit News" — he referred to the article in the Detroit News. That's (160) why I knew what happened.

Q. And you told Mr. Wendland about that visit from Mr. Bassel —

A. Absolutely.

Q. — in August — in April of 1979, while you were in the room at the Metropolitan Airport?

A. Most important event of my life, sir. My first FBI agent.

Q. Is Mr. Bassel's name reflected anywhere on that transcript that you can find?

A. Nowhere.

Q. Is that answer reflected anywhere in that transcript that you can find?

A. Nowhere.

Q. Is that answer or that question reflected anywhere in either of the two sets of tapes you listened to?

A. No.

Q. Are there other instances, Mr. Locricchio, of — from your recollection of this interview back in April of 1979 of errors either in the transcript or on the tape?

A. Yes, sir.

Q. Could you point those out to the Jury, if you could?

A. There are numerous errors, and I could get into all of those. I'm going to direct your attention to some verbiage where I say things that I know I didn't say, (161) okay?

Q. All right, if you can do that?

A. I would like to do that. On the transcript, page 11.

Q. That is at page —

A. Yes, on the bottom of page 11 and Mr. Wendland is speaking, and one of the initial things that I saw in this transcript that made me feel that the tapes just couldn't concur with the transcript — I had not gotten the tapes yet from you, Jerry, when I read this transcript, but I know that I never said anything like this. And it was then that I started to investigate the tapes.

Q. Which portion are you talking about, that you're directing the attention to?

A. I will read the questions, and my supposed answer.

> "Up until then, were those rumors that we talked about, that you guys were Mafia, had those rumors been there before?"
>
> My answer supposedly: "Oh, yeah, we had been interrogated by the FBI."

Q. That's page — you directed us to page 11, and that's actually on page 13.

A. Oh, I'm sorry, I'm sorry.

Q. Is that right?

A. Excuse me.

(162) Q. Page 11 is the single-spaced?

A. I have no numbers on this.

Q. All right.

A. I'm counting, but evidently I counted wrong.

Q. You're referring to the bottom of page 13?

A. That's correct.

Q. Top of page 14?

A. That's correct.

Q. And again, just so the members of the Jury can follow along with you if they wish, could you refer again to the portion of the transcript which does not accurately reflect what you said?

A. Wendland speaks at the bottom of page 13;

"Up until then were those rumors that we talked about, and you guys were Mafia, had those rumors been there before?

"Locricchio: Oh yeah, we had been interrogated by the FBI prior to that time."

Q. And how is it that you know that that's inaccurate?

A. Well, first of all I know I didn't say it. He's talking about rumors, I answer him with interrogation. But more important than that, those — if he would ask me a question about rumors I would again automatically told him [*sic*] that the Detroit News started my rumors.

But the tape that you gave me, a certified (163) copy of the tape — had an edit pop on it, had a pop. That's one of the questions that you've been asking of people what the noises are, and in the middle of that pop is a broken line indicating a splice in the verbiage. In other words, my voice breaks and then cuts into another word.

So that would indicate that that was either pieced in, or at least there's a section missing of that. And if you

play the tape, that section, is it very audible, even on the Court's copies, it's extremely audible on either one.

Q. Are there any other portions of the transcript that you can point us to now, Mr. Locricchio, that you can indicate to us is inaccurately transcribed or was inaccurately recorded, or at least inaccurately portrayed on the tapes?

A. Yes, yes. The first large hole, the 15-minute hole, has basically the whole story of Pine Knob, and talk about the rumors and everything else in it. That's not portrayed on the tapes. If I could have my copy of the transcripts, with all my marks in them, then I could make a reference to most of these, unless you want to use them and — .

Well, there's a lot of missing parts. If you want to start on the front page, there's some (164) mistranscribing after the question about the produce family, after Gary talks about him moving down there. These are audible and missing. It — me telling the story about I guess some of the accidents that I had, some of that missing, these are — they were just marked as "missing, missing, missing," but not truly significant to me.

We get down to the bottom of page three, where we say we actually laid the water mains, built the man holes. But we then have a long, long dissertation about how I believe that we really financially got off the ground, and it explained where we got a lot of our money, and that was the Allen Industries thing. It was a very important part of the interview, so I was concerned that that was missing.

Q. That is — when you refer to the Allen Industries, you explained that to the Jury earlier today, is that correct?

A. That is correct.

Q. Thank you. Any other areas?

A. Yes. In the Locricchio dissertation at the middle of the page on four, after "Gary and I got the $50,000

together for the deposit," as I told you today. After that I explained to Wendland that we just didn't have — we didn't just go to New York and get the money from (165) Teachers. We had five mortgage commitments, numerous mortgage — four or five mortgage commitments that date, and we selected Teachers. So I thought that that was not a true portrayal of what we had and it's audible also on the tapes.

Q. Are there any other areas which you can point us to in terms of inaccuracies in this transcription or the tapes?

A. Yes. Locricchio, at the middle of page six. Nowhere to be found on the tape was this question that Wendland is supposedly asking me after he talks about the Lenny Schultz loan, and he says to me: "All this money you guys owed — weren't you scared? How did you sleep at night? Didn't you ever worry?" That's nowhere to be found on the tapes. Nothing that even resembles that closely. Not a word of it that I can —

Q. Is that question in connection with the Schultz loan ever asked of you to your —

A. No — about me not being able to sleep because I owed Lenny money or anybody money? No, no.

There's something right in there that's missing. He comes back in and says, after he asked me the question about, my answer is supposed to be: "Well, we haven't got a hell of a lot to lose, and it's not too hard, okay. That's the attitude I always had, (166) where did I come from? I never thought of losing it."

What that's in relation to is Mr. Wendland asked me a question that I — he says to me: "You had all this money, you made all this money. Why did you keep on going, why didn't you guys just quit, pack it all in, you know?"

And I said, "Well, Mike, when you start from nothing you really haven't got — you know, that's where we're

coming from. We weren't thinking about the money, we were thinking about doing building, being entrepreneurs. We weren't thinking about the wealth that was attached to it or protecting that wealth, or going into a closet after we got it."

And that was what my statement was directly relative to, and not any question in relation to the Lenny Schultz loan. If you listen to the tape that's clear.

Q. Any other portions of the transcript, sir, that you believe are inaccurate in terms of what was said at that particular meeting?

A. He — there's a long piece of garbled tape, in that long, long piece of garbled tape, that's worth 15 minutes. I think we had calculated some half an hour of this interview was obliterated or left out of the transcript, one or the other.

(167) He was asking me some questions, I'm finalizing, telling him about the Pine Knob really coming into its own, when it really became a dollar-earning kind of music theater. I mean, it went into the black. And after that, it gets garbled real bad.

Anyway, I opened up with: "You got to remember, it's '73, '74, '75, Pine Knob's not being utilized to its fullest extent." I answer that quest — that — his question. So he was evidently asking me a question about '73, '74, and the Nederlander suit. And when I heard the question about the FBI, I kind of recollected that that was the '73, '74, and if you listen you might be able to retain that.

But I needed to clean the tapes off to do that, and I didn't have the time in order to do, clean those tapes off to see — the FBI questions, '73, '74, there is nothing about the FBI or how did that — what it says is, "How did the problems start to come out in '73, '74?" and then rrrrr, it's mumbled like that. With the Nederlanders and the suit.

Okay, "You got to remember, it's '73, '74" — that tipped me off also. That was clear and there was a pop in there to show me that the edit had come in there.

(168) Q. Now you're talking about, basically about the tapes that you reviewed, which were Thirty-Five and Thirty-Six, correct?

A. That's correct. Those tapes that I — they were certified copies.

Q. Sixteen and Seventeen, which have previously been marked and have been played to the Jury, have they ever been in your possession?

A. Never. Never.

Q. Have they ever been in the possession of anyone employed by you or in partnership with you, to your knowledge?

A. No, no.

Q. All right. Are there any other portions of the transcript, Mr. Locricchio, that you feel are inaccurate?

A. Well, Wendland asked the question, "What did you need money for exactly?"

Q. Again —

A. In the middle of page eight, I'm sorry. I answered the question, supposedly, "I mean everything, everything I mean, from groceries to mortgage balances. Hand to mouth." Now what happens is I say something like — and I remember saying "groceries to mortgage balances." "What do you mean, Mike? I need, (169) everything from groceries to mortgage balance." That's my statement.

There's a big, long dissertation explaining that, and then at the end of that I say "hand to mouth." There's long period of lull in there, but it reads like, you know, it's hand to mouth and that's all attached together. Anyway, that is a discrepancy.

We go down to two lines farther down:

> "Locricchio: I don't know, but I'll tell you one thing, that the $200,000 didn't clear up all the problem. It staved off"

— cut, and we have some missing conversation, and I cut back in on: "Called me back." All that other thing is missing: "How'd you meet the Magills?" is not in the tape. "Okay, Ad called me back," I cut in on "Called me back, he called me back." Now it seems that the tape was either shut off or there was an interruption in the room. I can't identify that. It does show a pop, indicating the tape going off.

Q. Is there any other area?

A. Yes. In the — in page nine in the dissertation by Ted Tetzlaff, that is very garbled and only shows — and we are on the ungarbled tape and hear this when Tetzlaff breaks in his conversation. He's very articulate, he doesn't stop and make cuts and breaks.

(170) And we have two, three pops in that section there, indicating turning on and turning off, and before we start that tape it said at the top that the recording is stopped to change the tape. So it wasn't after that that the recorder was stopped. It was stopped prior to that, and the recorder was actually stopped after that.

Q. Anything else in terms of discrepancies?

A. Well, Mike Wendland —

Q. Again could you refer to the page?

A. Page 11. Page 11, Mike Wendland makes a comment to me about: "There's two murders here now," like — and making reference to there's two murders involved in my story in my life story, and I laughed. It was a loud laugh. And he said, "Oh, no, no, no. I mean we were talking about the black board thing." Now I never talked about the black board thing, he always talked about it.

And he said, "You know, Harvey's here, and Agnes is here, and I'm kind of, I kind of get," you know, and here

he tells me that, "We're here to clear things up, so tell me all about what you know about Agnes and Harvey." He tells me we're here to clear things up again, and, you know, I laugh at him, at the murders. And he says, "Well," so I says, "What do you (171) want to know about Harvey? Tell me what you want to know."

So that's missing about Wendland's explanation of the black board theory, you know, stretch this thing all out on a black board and this and that. I mentioned black board and I started to say, "If you take this thing and put it on a black board, you could tie me up with the Pope" — like we did in your office the other day — with anybody you want to. By association — anyone through association of another can be named, can be an associate of that person.

So with that chain in mind, I can associate myself with President Reagan, or as I did for you on your own black board with the Pope. And I — you know — through association you can tie anyone into anything, and I started to explain that to Wendland. Tetzlaff cuts me off and I never get the explanation out.

Wendland makes up the theory about the black board and says in the articles later on that it's the law enforcement agency's black board. It never tells me anything about a black board in law enforcement. It's only his theory, I never said it. He says I said it. But that's missing from the transcripts.

(172) Q. Was there anything else, as far as you can tell?

A. A missing section after — in the middle of paragraph 12 after Wendland says, "How much" — there was some dissertation, we didn't say our estimate was — there was a section before our estimates were there, about four or five sentences. At the bottom of page 12, the question asked of me about, "Was I ever interrogated by the FBI?" and I answered, "Never, never."

And Wendland again goes back to the — he says, "We know there's rumors out there," and I said, "Rumors about what, you know, what are you talking about — that I stuffed Harvey? What are you talking about? What are these rumors? I want you to explain yourself about these rumors."

Well, he breaks away from that, he says, "You know, it's a black board theory again, the old black board." And I said, I told him that the FBI never asked me any questions about that, nor did anyone else take the time to come and ask me, and I was never under investigation about that.

* * *

FROM TRANSCRIPT VOLUME XX:

TESTIMONY OF PLAINTIFF GARY FRANCELL

* * *

(104) * * * Q. And to clarify for the Jury at this point, have you ever been a member of the Mafia?

A. No, I haven't.

Q. Have you ever been involved in organized crime?

(105) A. No, I haven't.

Q. Were you involved in any way in the Agnes Brush murder?

A. No, I wasn't.

Q. Did anyone ever question you about the murder?

A. No, they didn't.

Q. Did anyone even ask where you were on the day of the murder?

A. Not that I remember, no.

Q. With regard to the Harvey Leach murder, did you have any involvement whatsoever in that murder?

A. No, I didn't.

Q. Were you ever questioned about it?

A. No, I wasn't.

Q. Did anyone even ask where you were that day?

A. No, nobody asked me.

Q. All right. To take care of some of the other names that have come up, have you ever met John Pullman?

A. No.

Q. Have you ever met Meyer Lansky?

A. No.

Q. Have you ever met Anthony Zerilli?

A. No.

Q. Have you ever met Michael Polizzi?

A. No.

Q. Have you ever met Jack Tocco?

(106) A. No, I don't think so.

Q. Have you ever met Charles Goldfarb?

A. Maybe once at some doings, but I don't really recall.

Q. Have you ever met Anthony Giacalone?

A. No.

Q. Have you ever met Charles Monazym?

A. No.

Q. With regard to Leonard Schultz, have you ever met him?

A. Yes, once or twice.

Q. When was the first time you ever met Mr. Schultz?

A. When we paid off the loan at Freddie's office, he was in the outer office or vestibule.

Q. At the time you received the loan?

A. No, at the time we paid it off, I said.

Q. And what was the other time, if there was another time?

A. I think it was at the grand opening of the Hilton.

Q. Which Hilton?

A. The Troy Hilton.

Q. Have you ever met Joseph Burnett?

A. Yes I did, once.

Q. And where was that?

A. In Toronto, in his office.

Q. And other than that one meeting, have you had any contact with Mr. Burnett?

A. That was it.

(107) Q. Did you ever meet Arthur Rooks?

A. Yes, a couple times.

Q. What was the purpose of those meetings, or what took place?

A. One was negotiations to buy the ski resort, and the second time was at the closing — or maybe it was at the closing I met him the first time and the second time was the payment — we had a dispute about one of the payments or something, I might have met him with the attorneys.

Q. Do you have any recollection of meeting him prior to the time the purchase of the ski resort was being closed, at the closing of that purchase?

A. It might have been a day or so before, it was in that general area when I met him.

Q. Have you ever met Mr. Tamer?

A. Yes, I have.

Q. And what are the context of those meetings?

A. I met him in regards to going over to his office to pick up the loans that he had given us through Zenith. I worked with his attorney on some of the documentation. He come to our office a few times to talk about the Aladdin Theater complex. That was basically my meeting with James.

Q. Okay, in the context of those meetings, did there ever (108) come a time when you were aware that Mr. Tamer was involved in anything illegal or anything bad?

A. No, not that I ever knew about.

* * *

FROM TRANSCRIPT VOLUME XXX:
JURY INSTRUCTIONS

(18) * * * Now members of the Jury, Michigan law recognizes that insinuation, imputation or inference may be as defamatory as a direct, unveiled assertion. It is for you to determine if the articles as a whole carried a defamatory insinuation or inference. Each insinuation, imputation or inference must be false and printed with actual malice, as I will define that.

In order that the Defendants' words be defamatory, however, there must be a defamatory meaning conveyed, and the statement must have been of and concerning the Plaintiffs. The meaning of a statement is that meaning which, under the circumstances, a reasonable person who sees the statement would reasonably understand to be the meaning intended.

In considering whether or not a publication contains false and defamatory insinuation, imputation or inference, you may consider the text, headlines, (19) pictures, graphics, captions and cutlines. However, one obvious rule of limitation is that an entire writing, conversation, motion picture must be construed as a whole. The Plaintiffs may not lift words out of their context, and the defamation contained in one line may be negative [*sic*] or explained away by what appears elsewhere.

It is also clear that emphasis may be given a part of the publication, as in the case of headlines, which may convey a meaning which the remainder does not remedy. You are to consider the four articles comprising the Pine Knob series both individually and as a whole.

Whether the specified articles, read as a whole, falsely portray by defamatory insinuation or inference that Plaintiffs are or were members and/or associates of an organized criminal society, or engaged in other criminal conduct is for you to determine, members of the

Jury, from all of the evidence that has been admitted by the Court, regardless of which side has introduced it.

To the extent that you find that Plaintiffs consented to any statement and insinuation or innuendo or implication complained of, there can be no liability for that statement, insinuation, innuendo or (20) imputation. It is the Plaintiffs' burden of proof to satisfy you by a preponderance of the evidence that the statements or innuendoes complained of were false in some material respect and published with actual malice.

Plaintiffs will not have satisfied their burden of proving material falsity if you find that the Detroit News articles were substantially true. Slight inaccuracies which do not alter the complexion of the matters reported, do not constitute material falsity.

Actual malice, as I use it here, is a term of art and has a special meaning. The term actual malice does not include any consideration of spite, ill will or vindictiveness. A publication is made with actual malice only if it is made with actual knowledge that the statement was false, or if the Defendants acted with reckless disregard as to whether it was false.

Reckless disregard of falsity means that the statement was published with a high degree of awareness of probable falsity or that the Defendant in fact entertained serious doubts as to the truth of the publication.

For the purpose of the rule requiring actual malice on the part of the Defendant, mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth. Rather, the (21) Defendant must be shown to have acted with a high degree of awareness of probable falsity.

Now, members of the Jury, the law presumes that the character of the Plaintiffs was good until attacked. A presumption is an inference of law which holds good until it is invalidated by proof to the contrary.

In this case, evidence has been introduced that the Plaintiffs suffered from an injured reputation prior to the publication of the Detroit News articles. The weight to be afforded to that testimony is for your determination.

The law is clear that a Defendant is liable only for the damages which he has caused, and he is not liable for the injury done by others. Thus, you may consider whether the damages flowed from the articles complained of or from any other source or factor that may be in evidence.

If you believe from the evidence that at the time of the publication, the Plaintiffs already suffered from an injured reputation, then that must be taken into consideration when determining what portion of the damages may be attributable to the Defendants.

The exhibit, the transcripts of the television program broadcast by the CBC and aired on (22) Detroit area television Channel Nine, as well as the newspaper articles, were received for a limited purpose. They may only be considered as evidence of the prior reputation of the Plaintiffs and the lessening or mitigation of damages is the only issue for which you may consider that evidence.

You must not consider the exhibits as evidence of the truth of the statements that they contain.

I will now explain to you the burden of proof, which the law places on the parties to establish their respective claims. When I say that a party has the burden of proof, I mean the evidence must satisfy you that the proposition on which that party has the burden of proof has been established by evidence which outweighs the evidence against it.

You must consider all of the evidence, regardless of which party produced it. Libel is a statement of fact which is false in some material respect and is communi-

cated to a third person by printing, writing, or pictures, and has a tendency to harm a person's reputation.

The Plaintiff has the burden of proving that first, Defendant made the statement of fact complained of to a third person by writing or printing or pictures; (23) and second, that the statement was of and concerning the Plaintiff; third, the statement was false in some material respect, and the statement had a tendency to harm the Plaintiffs' reputation, and fourth, under Michigan law in this case, the Defendant had a qualified privilege to communicate information which was in the public interest.

Therefore, in order to recover, the Plaintiff has the burden of proving that the Defendant acted with actual malice.

Actual malice means that the Defendant had knowledge that the statement was false or that the Defendant acted with reckless disregard as to whether the statement was false.

Your verdict will be for the Plaintiff if you find that the Defendant made the statements or statement complained or [*sic*, of] to a third person by printing, writing and/or pictures; and the statement was of and concerning the Plaintiff, and the statement was false in some material respect and had a tendency to harm the Plaintiff's reputation, and the Defendant acted with actual malice.

Your verdict will be for the Defendant if you find the Defendant did not make the statement complained of to a third person by printing or writing (24) and/or pictures, or the statements were not of and concerning the Plaintiff, or the statements were not false in some material respect and did not have a tendency to harm the Plaintiff's reputation, or the Defendant did not act with actual malice.

Your verdict will be for the Defendant if you decide that any one of these has not been proven.

Your verdict will be for the Plaintiff if you decide that all of them have been proven.

* * *

VERDICT [*LOCRICCHIO*]

(State of Michigan — Circuit Court — County of Wayne)

(JOSEPH J. LOCRICCHIO and GARY FRANCELL, Plaintiffs, vs THE EVENING NEWS ASSOCIATION, INC., a Michigan corporation, MICHAEL F. WENDLAND and JEAN GADOMSKI, Jointly and Severally, Defendants — Case No. 80-012415 CZ; Hon. Michael J. Connor)

We, the jury, make the following answers to the questions submitted by the Court with regard to plaintiff JOSEPH LOCRICCHIO:

QUESTION NO. 1:

Did the defendants make the statement of fact complained of to a third person by printing/writing and/or pictures?

ANSWER (YES OR NO): NO [*HANDWRITTEN*]

If your answer is "no," do not answer any further questions.

QUESTION NO. 2:

Was the statement false in some material respect and did the statement have a tendency to harm the plaintiff's reputation?

ANSWER (YES OR NO): _____ [*BLANK*]

If your answer is "no," do not answer any further questions.

QUESTION NO. 3:

Was the statement of and concerning the plaintiff?

ANSWER (YES OR NO): _____ [*BLANK*]

If your answer is "no," do not answer any further questions.

QUESTION NO. 4:

Did the defendants have knowledge that the statement was false or did defendants act with reckless disregard as to whether the statement was false?

ANSWER (YES OR NO): _____ [*BLANK*]

If your answer is "no," do not answer any further questions.

QUESTION NO. 5:

What is the total amount of plaintiff's actual damages?

ANSWER (ACTUAL DAMAGE): _____ *[BLANK]*

If your answer is "0" actual damages, do not answer any further questions.

QUESTION NO. 6:

Did the defendants publish the statement complained of with bad faith or ill will?

ANSWER (YES OR NO): _____ *[BLANK]*

If your answer is "no," do not answer any further questions.

QUESTION NO. 7:

Before starting this lawsuit, did plaintiff give notice to defendants to publish a retraction and allow defendants a reasonable time to do so?

ANSWER (YES OR NO): _____ *[BLANK]*

If your answer is "no," do not answer any further questions.

QUESTION NO. 8:

Did plaintiff incur some incremental or increased injury to his feelings that was not compensated for in your award of actual damages?

ANSWER (YES OR NO): _____ *[BLANK]*

If your answer is "no," do not answer any further questions.

QUESTION NO. 9:

Was this incremental or increased injury to feelings attributable to the sense of indignation and outrage experienced by plaintiff caused by defendants' bad faith or ill will?

ANSWER (YES OR NO): _____ *[BLANK]*

If your answer is "no," do not answer any further questions.

QUESTION NO. 10:

What is the total amount of plaintiff's exemplary damages for this incremental or increased injury to his feelings?

ANSWER (EXEMPLARY DAMAGES): _____ *[BLANK]*

Signed,

/s/ Margaret Sue Williams, Foreperson

VERDICT [*FRANCELL*]

(State of Michigan — Circuit Court — County of Wayne)

(JOSEPH J. LOCRICCHIO and GARY FRANCELL, Plaintiffs, vs THE EVENING NEWS ASSOCIATION, INC., a Michigan corporation, MICHAEL F. WENDLAND and JEAN GADOMSKI, Jointly and Severally, Defendants — Case No. 80-012415 CZ; Hon. Michael J. Connor)

We, the jury, make the following answers to the questions submitted by the Court with regard to plaintiff GARY FRANCELL:

QUESTION NO. 1:

Did the defendants make the statement of fact complained of to a third person by printing/writing and/or pictures?

ANSWER (YES OR NO): YES [*HANDWRITTEN*]

If your answer is "no," do not answer any further questions.

QUESTION NO. 2:

Was the statement false in some material respect and did the statement have a tendency to harm the plaintiff's reputation?

ANSWER (YES OR NO): YES [*HANDWRITTEN*]

If your answer is "no," do not answer any further questions.

QUESTION NO. 3:

Was the statement of and concerning the plaintiff?

ANSWER (YES OR NO): YES [*HANDWRITTEN*]

If your answer is "no," do not answer any further questions.

QUESTION NO. 4:

Did the defendants have knowledge that the statement was false or did defendants act with reckless disregard as to whether the statement was false?

ANSWER (YES OR NO): YES [*HANDWRITTEN*]

If your answer is "no," do not answer any further questions.

QUESTION NO. 5:

What is the total amount of plaintiff's actual damages?

ANSWER (ACTUAL DAMAGE): $3,000,000 *[HANDWRITTEN]*

If your answer is "0" actual damages, do not answer any further questions.

QUESTION NO. 6:

Did the defendants publish the statement complained of with bad faith or ill will?

ANSWER (YES OR NO): NO *[HANDWRITTEN]*

If your answer is "no," do not answer any further questions.

QUESTION NO. 7:

Before starting this lawsuit, did plaintiff give notice to defendants to publish a retraction and allow defendants a reasonable time to do so?

ANSWER (YES OR NO): _____ *[BLANK]*

If your answer is "no," do not answer any further questions.

QUESTION NO. 8:

Did plaintiff incur some incremental or increased injury to his feelings that was not compensated for in your award of actual damages?

ANSWER (YES OR NO): _____ *[BLANK]*

If your answer is "no," do not answer any further questions.

QUESTION NO. 9:

Was this incremental or increased injury to feelings attributable to the sense of indignation and outrage experienced by plaintiff caused by defendants' bad faith or ill will?

ANSWER (YES OR NO): _____ *[BLANK]*

If your answer is "no," do not answer any further questions.

QUESTION NO. 10:

What is the total amount of plaintiff's exemplary damages for this incremental or increased injury to his feelings?

ANSWER (EXEMPLARY DAMAGES): _____ *[BLANK]*

Signed,

/s/ Margaret Sue Williams, Foreperson

[PAGE 4-A–THE DETROIT NEWS SUNDAY, APRIL 22, 1979]

NEWS NOTES

Two News reporters with two news styles

By BILL GILES
Editor of The News

Mike Wendland and Jean Gadomski, who produced the series on Pine Knob, spent two months reporting and writing the story.

"A boring assignment," grumps Mike.

"Stimulating, challenging," enthuses Jean.

The conflicting views say a lot about news reporters and news reporting. And they confirm anew what their editors had guessed earlier — Mike and Jean would make a good team on the assignment. The story, which begins today and runs through Wednesday, traces the roller-coaster fortunes of Pine Knob and the people who developed it into one of the nation's foremost entertainment complexes.

On the surface, it's a marvelous success story, a wild-to-riches saga. Beneath the surface, it's still a success story, but more complex and shadowed by reports of Mafia involvement, desperation loans, washed money, land deals, FBI inquiries and two unsolved murders. It's a story in which everybody knows something (or thinks he does), and nobody knows everything.

It is a story, in short, that needed to be sorted out and told as fully, factually and fairly as possible.

Mike is generally called an "investigative" reporter. In truth, of course, all good reporters investigate things. That is, they "observe or study by close examination and systematic inquiry." But newspaper reporters, operating mostly under daily deadlines, commonly do not get enough time to study one subject at length.

Mike has, and the results have been rewarding. His most notable investigative stint was working as a reporter on "The Arizona Project" in late 1976 and early 1977. He was one of some 36 reporters from different newspapers who banded together to investigate corruption and organized crime in Arizona, after the Phoenix murder of newsman Don Bolles.

Although the Arizona project and the Pine Knob story required patient sifting of all kinds of facts, Mike is more a "people" reporter than a record searcher. He prefers to gather facts live, in face-to-face interviews, probing here and probing there for nuggets of new information direct from sources. He penetrates well, as the Pine Knob story shows.

Jean, on the other hand, thrives on conventional research — locating public records, checking legal contracts, doping out land and leasing arrangements. The search and discovery of needed information, rather than being tedious, becomes challenging and intensely interesting. "It's my natural element," she says.

Jean honed her investigative skills as a researcher-writer in Contact 10 after joining The Detroit News in 1969. Her thoroughness and accuracy led eventually to assignment at the news desk and, last January, to promotion to staff writer. A native of Winnipeg, Jean grew up in Windsor and worked her way through the University of Windsor, where she majored in English.

Mike got into news early, writing and reading reports on WKNX radio-television in Saginaw, while still at Delta College in University Center. After a four-year hitch as a reporter at the Bay City Times, he joined The News in 1971. In addition to his News work, Mike has written three books: "CB Update," "The Wendland CB Glove Compartment Bible," and "The Arizona Project."

Mike's handle, by the by, is KKE 4451.

And you might be interested to know that Jean's last name is the name of a small town in northern Poland near the Soviet border, from which her father emigrated.

More —Tomorrow

[PAGE 1-A–THE DETROIT NEWS SUNDAY, APRIL 22, 1979]

THE PINE KNOB STORY

How 2 friends and hustle created a big resort, millions in debts and a question: 'Is it Mafia?'

By MICHAEL F. WENDLAND
and JEAN GADOMSKI — News Staff Writers

They are the land gamblers.

Power brokers with the right connections — widely suspected to be "Mafia" — They parlayed an idea into the kind of money it takes to make a mountain . . .

A ski mountain called Pine Knob, part of a now-flourishing 600-acre complex in the gentle hills and salvaged swampland of Oakland County's Independence Township.

But Joseph J. Locricchio, who owns the multimillion-dollar resort with Gary Francell, says the feeling "Pine Knob is Mafia" is so widespread that "even my mother sometimes has her doubts."

While Locricchio and Francell vehemently deny mob involvement, they admit that they are on "all the computer crime lists" as organized crime figures.

THEY AGREED to talk to The News — which has been examining the financial dealings of Pine Knob for two months — "to clear the air."

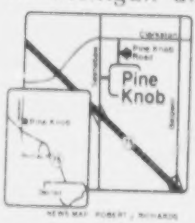
The ski resort is but one part of Pine Knob. There is the plush Pine Knob Golf and Country Club; a village of $300,000 condominiums and the 7-year-old Pine Knob Music Theater, an entertainment phenomenon that has expanded to Las Vegas and is now headed for suburbs of Dallas and Chicago.

And, just announced — a 21-story hotel, the roof to serve as the top of a new ski slope.

Some 300 people work at the various Pine Knob enterprises. The music theater alone draws more than a million people a year.

Locricchio and Francell wear silk shirts, drive expensive Mercedeses and Corvettes and fly about the country in their own twin-engine airplane. Both come from middle-class Detroit families and neither went to college.

In the last eight years Pine Knob, in Oakland County, has developed from a losing ski resort into one of the nation's foremost entertainment complexes, worth millions. During these years the persistent question in Michigan and elsewhere has been "is it Mafia?" This is the first of four articles resulting from two-months' examination by The News of Pine Knob's finances and ownership.



LOCRICCHIO, 38, is short and powerfully built, with wide shoulders and a narrow waste sculpted during the early years he pushed cement-filled wheelbarrows for his building contractor grandfather. His father, Paul Locricchio, has long been active in the produce business. The son is proud of his Sicilian heritage and protective of his large family. He is outgoing and talkative.

Francell, 39, his partner, is quiet, almost shy. Tall and slim with dark, swept-back hair, he was just out of high school when his father was killed in an auto accident and he inherited the family's wholesale meat business. Francell is of French and German heritage.

Raised on Detroit's east side and friends since they were 16, both say they have made some "dumb mistakes." One of them resulted in a criminal record. Last fall they pleaded guilty to lying about their debts when applying for a loan from a federally insured bank. They were ordered to pay a $500 fine. It is the only mark on their record.

ANGERED BY what they claim is harassment from the FBI, the Internal Revenue Service and state and local law enforcers, they nevertheless say they can see why "people think we're mob." For, tangled in the confusing, often incredible story of how they made Pine Knob, are:

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Pine Knob Story: 2 friends with hustle

- Two unsolved murders. Though separate, the killings share common elements that lead to some of the same people who figured in Pine Knob's development.
- A so-called "money wash" in which a Toronto firm linked to an associate of Meyer Lansky, the Mafia's key money man, hid the source of a $200,000 Pine Knob loan.
- A $4-million cost overrun by Locricchio and Francell in the building of a glittering theater for Las Vegas's Aladdin Hotel and Casino.
- Several investors associated with organized crime who either lent or helped Locricchio and Francell raise large sums of money.

OTHER DATA make the Pine Knob story even more muddled.

While Locricchio and Francell are the resort's principal owners, other diverse people and groups have had a stake in it:

- There is the multinational manufacturer, Borg-Warner Corp., which sells the condominiums at Pine Knob, and the publicly owned, highly diversified Ogden Corp., which manages the restaurants.
- There are five Macomb County businessmen who quietly invested almost $1.5 million at a time when the resort was on the brink of financial ruin. The

five refuse to discuss their former role as silent partners.

- There is the wealthy Nederlander family of Detroit, which runs the Pine Knob music theater along with a growing nationwide string of theaters and concert operations that makes them the country's foremost entertainment concern.
- And there are the creditors, the construction companies, the banks, mortgage companies and state and federal agencies that have filed millions of dollars in civil suits, tax liens and loan foreclosures seeking settlement of unpaid Pine Knob bills.

THESE INTERWOVEN elements make up the complicated financial skein out of which the entertainment center was created.

Pine Knob began in 1962 when four men who owned an asphalt company purchased 40 acres and leased some 60 acres of land from a Clarkston area osteopath, Dr. Harley J. Robinson.

"There wasn't much there," Dr. Robinson told The News, "but woods and wilds and an old mansion."

The mansion still stands. It is the clubhouse for Pine Knob's golf club. Built at the turn of the century by Col. Sidney Waldon, vice-president of the old Packard Motor Car Co. and the land's original owner, the sprawling three-story Gothic structure was used as an alcoholic treatment center by Ford Hospital before Robinson bought it in 1953.

'I said I got to have this land. I became a Pine Knob junkie.'

The four who acquired the land from Robinson were owners of the A & A Asphalt Co. of Pontiac: Alex Kachinko, Stanley J. Jesky, Reno Ministrelli and Arthur J. Rooks. Kachinko died in 1970.

THE STORIES of mob involvement in Pine Knob began with that purchase.

Rooks, a former justice of the peace in Hamtramck, was a friend and associate of Anthony Zerilli, the son of the Detroit Mafia's founding boss, the late Joseph "Mr. Joe" Zerilli.

In 1972, Rooks, Anthony Zerilli and another Detroit Mafia figure, Michael Polizzi, were convicted of conspiring to maintain a hidden interest in the Frontier Hotel and Casino in Las Vegas. Federal prosecutors said Rooks was the "front man" for the two Mafiosi. Zerilli and Polizzi went to prison. Rooks and Detroit lawyer Peter J. Bellanca, who was also convicted, were placed on probation.

The efforts of the A & A partners to make something of Pine Knob foundered. In July of 1971, in the midst of the Las Vegas criminal proceedings, Rooks and his partners sold their holding for $1.55 million, according to land records filed in Oakland County.

THE BUYER was Indusco Corp., a land development company owned by Locricchio and Francell.

Locricchio recalls his first visit to Pine Knob. A friend, Paul Bosco, a partner in B & V Construction who had done some of the road paving at the resort for Rooks, showed Locricchio the land.

"He took me all around, behind the hill, by the old mansion," recalls Locricchio. "It was like being in upstate New York. I said I got to have this land. I became a Pine Knob junkie."

Michigan Commerce Department records show that Indusco had been formed six years before, an offshoot of a Locricchio firm called J & J Floors, formed in 1964 when Locricchio was 23. His partner was Joseph Brennan, the brother of Michigan Court of Appeals Judge Vincent Brennan.

In 1966, Locricchio bought out Brennan, expanded from laying concrete to constructing buildings. He then brought his boyhood pal, Gary Francell, into the business.

THE PARTNERS say their first success was an office buiding for Allen Industries on 14 Mile in Madison Heights. The firm needed to occupy the building in 90 days. No other building contractor would guarantee such a short completion time. Indusco built it in 88 days.

Twenty-hour days put Locricchio in the hospital suffering from exhaustion, but the job won the company another contract. Soon, they were developing their own 20-acre industrial park in Madison Heights. That led them to a 100-acre site in Troy where they eventually were to build the $6-million Troy Hilton Motor Lodge, among other buildings.

At the time of the Pine Knob purchase in July of 1971, Indusco was heavily in debt.

Records in Oakland, Wayne and Macomb counties show that the firm was mortgaged or indebted to various concerns for more than $4 million.

LOCRICCHIO SAYS that although the firm was heavily in debt it was able to meet its obligations.

"Gary and I were pretty fat back then," said Locricchio. "We had money in the bank, an oddity we've never experienced again . . . We were under the misguided impression that we were General Motors."

In the first four months of development, heavily indebted Indusco shelled out a half-million dollars to improve the ski slopes and lodge. Then, a poor season, with little snow, kept the crowds away. The debts continued to mount.

The purchase of the Pine Knob land increased their debt from $4

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THE PINE KNOB STORY

Their debts grew to over $ 17 million

million to $6 million.

But the two partners persisted. From Dr. Robinson, they bought almost 500 more acres around the ski hill. To help pay for it, they sold off much of their industrial park holdings in Troy, Madison Heights and Livonia.

"WE'RE DOWN to the skinny nitty-gritty by this time," Locricchio explains. "We're financially not fat by this time. In fact, things are getting tough."

In early 1972, they made a timely connection. It put them in business with the Nederlander Theatrical Corp.

The Nederlander corporation consists of five brothers whose late father, David T. Nederlander, founded a business which now owns or operates 19 dramatic and music theaters in 10 major American cities, including Detroit's Fisher. Those entertainment outlets make the family the nation's largest buyer-bookers of contemporary and classical talent.

It was the Nederlanders who came up with the idea to build the Pine Knob Music Theater, which would turn out to be a hit from the start.

IN MARCH, 1972, Locricchio and Francell signed a contract with the Nederlanders, agreeing to construct the $3-million outdoor music theater. Under the agreement, Indusco built the facility in exchange for 80 percent of the music theater's annual profits plus $60,000 in rent. The lease extends to the year 2000.

Last year alone, that connection paid Locricchio and Francell $1.6 million, the two told The News.

But, to build the music theater in 1972 and continue the expansion of the resort, the already overextended Indusco Corp. needed more money. The cost of the theater, financing of the additional land purchases, construction of an 18-hole golf course, the ma...ng of a lake, road construction, ski hill expansion, lifts and lounges skyrocketed Locricchio and Francell's debts to more than $17 million, The News learned.

"They have little or no perspective on costs," says their Chicago lawyer, Theodore Tetzlaff. "Once you get into that kind of (debt), it's just a way of life. And once you start to live with it, it doesn't matter whether it's a thousand dollars or a hundred million dollars."

TO MAKE the payments on their dozens of notes, mortgages and loans for Pine Knob and their various other operations in Troy and Livonia, Locricchio and Francell needed a tremendous cash flow. They didn't have it.

"We needed money for everything from groceries to mortgage payments," said Locricchio. "We were really living hand-to-mouth."

Their payments fell short. Banks reexamined the partners' liabilities and refused to extend any more credit.

In the summer of 1972, the two partners were in the worst financial bind of their careers. They needed $200,000 — "desperately," says Locricchio — to stave off foreclosure on outstanding notes.

The partners would get the money.

But in doing so, they would become involved in an incredible financial intrigue to be investigated by three federal grand juries.

More than anything else, it was that loan that put Locricchio and Francell on the organized crime lists.

Tomorrow: A money wash and two murders.

What's at Pine Knob?

These facilities at Pine Knob are open to the public:

SKI LODGE — Cafeteria to accommodate 300 skiers; includes dining room and fireside cocktail lounge, ski shop and equipment rental. Capacity 260 persons.

SKI HILL — Five chair lifts, 4000-foot run.

SUMMER OUTDOOR MUSIC THEATER — Featuring top entertainment acts. Capacity 10,500 persons.

What's at Pine Knob? [*continued*]

These facilities are exclusive:

GOLF AND COUNTRY CLUB — Private membership limited to 275. Fees, $1,300 annually, entitle members to use of 18-hold championship golf course and clubhouse facilities. Includes main dining room with 125 capacity; two small, private dining rooms, each accommodating 75 persons; cocktail lounge (members grill room); members lounge and piano bar; separate locker and workout rooms for men and women.

HALFWAY HOUSE — Between ninth and 10th fairways, originally the coachhouse for the estate of Col. Sidney Waldon, former vice-president of the Packard Motor Car Co., houses cocktail bar, restaurant serving sandwiches and snacks. Outdoor dining area. Capacity 60 persons.

PRO SHOP — For golfers, swimmers, tennis players and (in winter) cross-country skiers.

SWIMMING POOL — 30 by 60 feet.

TENNIS COURTS — six outdoor courts, paved, lighted.

LAKE FLEMING — Approximately 26 acres, spring-fed with beach area. Sailing, canoeing and fishing for members only. The golf course plays around this lake.

CONDOMINIUMS — Luxurious Tudor-style, stucco-walled homes with 20 completed units, 32 additional units planned. Priced between $161,000 and $300,000. A structure featuring similar architecture disguises the pumphouse and provides a formal arched entrance to the condominium area.

GATEHOUSE — To golf course, country club, condominiums; 24-hour security guard protection.

[PAGE 1-A–THE DETROIT NEWS MONDAY, APRIL 23, 1979]

THE PINE KNOB STORY

How loan got 'washed'

By MICHAEL F. WENDLAND and JEAN GADOMSKI — News Staff Writers

Pine Knob owners Joseph J. Locricchio and Gary Francell agree that their business connections, when diagrammed on a blackboard, make them appear to be "organized crime figures."

Inserted in that diagram are the names of two murder victims, the names of persons involved in unusual financial deals and the names of associates identified with the Mafia by federal agents.

Locricchio says that such a diagram, drawn by police agencies, as well as his Sicilian heritage, has unfairly put the sign of the Mafia on Pine Knob.

Locricchio says it also explains why many people and police agencies suspect that the owners of the multimillion-dollar ski, golf and music resort are "Mafia." Says Locricchio: "Even my own mother sometimes has her doubts."

That's why the partners say they agreed to talk to The News about the development of Pine Knob — to clear the air.

In the last eight years Pine Knob, in Oakland County, has developed from a losing ski resort into one of the nation's foremost entertainment complexes, worth millions. During these years the persistent question in Michigan and elsewhere has been "is it Mafia?" This is the second of four articles resulting from a two-months' examination by The News of Pine Knob's finances and ownership.

THE FIRST of the two murders on the law enforcement diagram occurred on Oct. 27, 1972 , when Agnes Brush, who worked as the bookkeeper of a small auto supply firm, was stabbed to death. Three months earlier Miss Brush's boss had secretly made a $200,000 loan to Locricchio and Francell — a loan "desperately" needed by the partners to stave off foreclosure on out-

standing debts. To hide its source, the money was "washed" or routed through a Toronto money broker with mob associations.

The second murder took place 17 months later, on March 16, 1974. The victim was Southfield furniture magnate Harvey Leach, whose nearly decapitated body was found in the trunk of his luxury automobile.

Leach had been working with Locricchio and Francell on construction plans for a chain of furniture stores, called Joshua **Continued on Page 10A**

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How vital Pine Knob loan was 'washed' in Toronto

Doore. Loans negotiated through the same Toronto money broker financed the building of those stores.

LOCRICCHIO and Francell say they know nothing about either killing, and insist it is coincidental that some of the same people were involved in the loans to Leach and Pine Knob. A score of police agencies have investigated the murders and have not proved otherwise.

The financial manipulations that seemed to police to link the killings began in the summer of 1972 before Pine Knob was the booming success it is today. Locricchio and Francell say they were desperately in need of $200,000 to make payments on various loans, mortgages and debts.

Unable to find a bank or commercial lending source willing to extend them additional credit, the partners turned to friends.

One of them was Adele Volpe, business partner of Paul Bosco in B & V Construction of Novi, a paving firm that laid the early roads at Pine Knob.

It was Bosco who first showed Locricchio (in 1971) the rolling Independence Township property that would eventually become the multimillion-dollar Pine Knob complex.

"**I CALLED** (Volpe) and said I needed $200,000 for a month, two months," Locricchio told The News. "Adele (Volpe) said he couldn't help but he'd see what he could do. Ad called me back. He said, 'I have this friend. His name is Bill Magill. He'll give you the money.'"

But there was a condition to getting the loan, Locricchio discovered.

"'He doesn't want anybody to know about it,'" Locricchio said he was told. "I said, 'Adele, why?' He (Volpe) said, 'He's got a daughter, 16 years old, he's deathly afraid that anybody should know he's got this kind of money.'"

William Magill is the owner of Malag Tube Specialties, a small manufacturing firm that supplies exhaust pipes and hydraulic tubes to the auto industry. The firm, then based in Detroit, was run by Magill, his wife, Joyce, and her sister, Agnes Brush.

ALTHOUGH Magill, an Irish immigrant, has refused to return telephone calls to The News, he and his wife did talk at length in a Sept. 12, 1973, interview with Lawrence Leff, then head of the U.S. Justice Department's Organized Crime Strike Force in Detroit, and two FBI agents.

In the 148-page transcript provided The News by Locricchio's and Francell's attorney, Magill said he had not met Locricchio or Francell until he withdrew all but $5,000 of his life savings to loan them $200,000. He said he gave the money without a promissory note and with no firm understanding as to when it would be repaid.

A handwritten quitclaim deed to the Pine Knob land, hastily drawn up by Locricchio and Francell in Magill's living room, was the only security Magill had, according to the transcript. Quitclaim deeds sign off an interest in a property but do not guarantee title.

"**WHY ON** earth would two sensible people take all of their savings and give it to a relative stranger without

any security whatsoever?" asked Leff, the government attorney.

"All that we know about him (Locricchio) is that he is a very hard-working man," said Magill, according to the transcript. ". . . I admire this . . . I admire Joe. That is the only honest reason."

Six months after turning over the money — with the loan still unpaid — Magill said he was called by Locricchio and asked for an additional $80,000. Magill said, according to the transcript, he agreed to the new loan. But he had to borrow the sum to provide it.

The federal agents asked Magill why he insisted on making sure that no one knew he was the source of the $200,000 loan.

"I guess I asked him (Locricchio) not to tell anybody," Magill said, according to the transcript, "but it wasn't for the purpose of hiding the money. It was for the purpose of — if someone knows you have something, no matter what it is, you leave yourself open for robberies or . . ."

HIS WIFE interrupted. "He did say to Joe (Locricchio) that he was always scared of robberies or kidnapping of his daughter. He has been an awful farmer (unsophisticated) on that for years," Mrs. Magill said.

The $80,000 loan was repaid within several months. The $200,000 loan was not repaid until 1977 — and was paid only after Magill began a foreclosure procedure against Pine Knob.

Locricchio told The News that Magill's insistence on secrecy concerned him at first, but that he needed the loan badly and was convinced Magill was "legitimate."

To handle the details of the loan, Locricchio contacted an old friend, Southfield attorney Fred Gordon.

"Freddy's the best deal-maker I've ever met in my life," Locricchio said. "Freddy could sit down and fashion you a package like no one in the world."

GORDON WAS the prime mover behind the Troy Hilton Motor Inn, built by Locricchio on Locricchio-owned land; also the Northfield Hilton Inn, the Detroit Hilton (now closed), the Mt. Laurel (New Jersey) Hilton Inn, Southfield's Traveler's Tower Building, the Wolverine Tower Building in Ann Arbor and various other real estate developments worth, by Gordon's estimate, more than $100 million.

Once before Gordon had helped Locricchio find a private money source. In the late 1960's, Gordon put Locricchio in touch with Leonard Shultz, a Southfield labor consultant and nursing home owner.

Shultz, a self-described millionaire, has a police record that dates back to 1944 and includes prison terms for receiving stolen property, probation violation and larceny from a building. Pontiac police records show his last conviction was in 1960 for arson.

The Shultz loan, repaid within several months, helped Locricchio and Francell over a rough spot in their various financial dealings. In 1972, Gordon again came to the rescue by finding a way to keep Magill's identity secret.

"FREDDY HAD a brainstorm," Locricchio explained. "He said, 'Look, instead of borrowing the money (directly from Magill), we'll use the money for collateral for another loan.'"

On July 25, 1972, Locricchio and Francell picked up the $200,000 from Magill. The next day, Francell drove to Toronto with the money. Gordon flew there.

Together, they entered the offices of Toronto attorney Joseph Burnett, who ran a large, international real estate financing company. Francell gave Burnett the cash. In turn, Burnett gave the Pine Knob partners a $200,000 loan, the check drawn on one of Burnett's companies, thus hiding Magill's role in the transaction.

While the transaction was legal, it was unorthodox and it attracted the attention of the Ontario Provincial Police, who in turn talked to the FBI. Locricchio said he paid Burnett 8½ percent interest to handle the transfer.

BURNETT WAS known to Canadian authorities as an associate of John Pullman, described by U.S. authorities as "an organized crime money man" who controlled the secret Swiss bank accounts of American mobsters.

Pullman, who admitted to Canadian authorities he was a close friend of Meyer Lansky, the Mafia's financial wizard, had invested some $2.5 million through Burnett in various real estate ventures.

The murder of Agnes Brush, Magill's sister-in-law, occurred three months after the $200,000 loan was made by Magill.

Miss Brush, dark-haired, attractive and 37, was the bookkeeper for Magill's company. On Oct. 25, 1972, she was in charge of the office. The only other persons working that day were Magill and a 61-year-old laborer. Both had left the building, Magill to go on a business call in the morning, and the employe for lunch at 1:15 p.m.

WHEN THE laborer returned about 2 p.m., he found Miss Brush dead on the floor of a back office. She had been stabbed nine times in the chest. An intensive police investigation ruled out robbery as a motive. Miss Brush had not been sexually attacked.

Though a motive for the killing was never established, two elements surrounding the crime continue to intrigue police.

- Miss Brush had told friends she disapproved of the way her brother-in-law, Magill, and sister were spending money. She particularly objected to their frequent gambling trips to Las Vegas. She also said she thought the company's business assets were being squandered.

- The only suspect was the 61-year-old laborer who worked with Miss Brush. Though he denied any involvement in the killing, he continued to work at the firm and steadfastly refused to take a lie detector examination, even after Magill asked him to do so at the request of police. "Have you threatened his job (for refusing)?" asked strike force attorney Leff when federal agents questioned Magill in 1973. "We aren't that type of people," Magill replied.

MAGILL SAID, in the transcript, he believed the employe was innocent. He also voiced concern that the murder would cause problems for Locricchio.

"I don't want to cause people that don't even know her unnecessary heartache," Magill told the federal agents. "Like what we had to go through because we loaned this ($200,000) to Joe (Locricchio). This is what hurts, going off on this vein."

Locricchio told The News that he had never met Agnes Brush. He said the first he heard of her murder was when Adele Volpe, who introduced Locricchio and Francell to Magill, called him to say that Magill was so disturbed by the murder that he could no longer conduct his business at the Detroit location.

Locricchio says he found another factory for Magill: "We got out electricians and carpenters and we wired the place up for him. We moved him in one weekend. Then Bill went back to work."

THE TRANSCRIPT of the Magills' questioning shows that law enforcement officials thought the couple were being blackmailed.

"It has run through my mind that you were a victim of machinations on the part of other people," strike force attorney Leff told the couple.

"It just shocks me because these people, we found, have been very good to us," Mrs. Magill said. "They are very nice people. They never put any pressure on."

"Which people?" asked Leff.

"Mr. Locricchio," replied Mrs. Magill.

The names of some of the same people involved in laundering the $200,000 Magill loan surfaced in the police investigation of the murder of Harvey Leach in March 1974, The News learned.

Locricchio and Francell told The News they and Leach were "extremely close" friends. They had been introduced by Fred Gordon. A lamp manufacturing company Gordon and Leach co-owned was operated in a building owned by the Pine Knob partners.

The $80,000 loan was repaid within several months. The $200,000 loan was not repaid until 1977 — and was paid only after William Magill began a foreclosure procedure against Pine Knob.

WHEN LEACH, the brain behind the Joshua Doore furniture concern, decided to expand, the relationship intensified, Locricchio said.

Locricchio told The News that he traveled around the country with Leach to inspect various buildings similar to the structures Leach wanted to build for warehouse-style furniture showrooms.

It was Locricchio and Francell's Indusco Corp. that sold the land for the first Joshua Doore warehouse in Livonia in June of 1972, records on file with the Wayne County Registrar of Deeds office show.

According to land records, the Livonia warehouse and Joshua Doore buildings in Allen Park, Taylor and Warren were owned by MBA, Inc., which in turn leased the property to Leach.

Michigan Commerce Department records show that Fred Gordon was the president of MBA.

The names of some of the same people involved in laundering the $200,000 Magill loan surfaced in the police investigation of the murder of Harvey Leach in March, 1974, The News learned.

ON MARCH 14, 1974 — two days before Leach was killed — all four Joshua Doore warehouses were mort-

gaged by Gordon for $400,000. The firm picking up the mortgage was CNA Mortgage Investors, Ltd., controlled by Toronto's Joseph Burnett — the man who laundered the Magill loan to Pine Knob.

Leach was murdered after leaving his fiancée's house in Southfield to go to a meeting at the Franklin home of Leonard Shultz, Joshua Doore's labor consultant. Shultz said Leach never showed up. The murder remains unsolved.

Locricchio and Francell — and their attorney, Theodore Tetzlaff of Chicago — are puzzled by the coincidences. But they say they are only coincidences.

"Imagine what I felt," says Tetzlaff, recalling his initial visit with his clients, (Locricchio and Francell retained him in 1977 to assist them in dealing with the growing interest of federal authorities in their affairs).

"They come into my office, sit down and . . . they start telling me these things (about the Magill loan and Leach's murder). 'Well, there's Harvey in the trunk of the car, and then we went to Toronto and . . .'

"Holy smokes!"

Tomorrow: The Las Vegas Connection.

[PAGE 1-A–THE DETROIT NEWS TUESDAY, APRIL 24, 1979]

THE PINE KNOB STORY

A brush with bankruptcy

By MICHAEL F. WENDLAND and JEAN GADOMSKI — News Staff Writers

In October, 1975, the sprawling Pine Knob entertainment complex in Oakland County's Independence Township was dangerously close to turning belly up.

The owners, Joseph J. Locricchio, 38, and Gary Francell, 39, owed $17 million to banks, insurance companies and mortgage firms. More than 65 civil suits were filed in the following months, seeking foreclosure, damages

or liens for everything from delinquent plumbing bills to unpaid taxes.

The partners even were overdue in paying their accountants, the Southfield firm of Stricof & Polk, which had the job of straightening Pine Knob's tangled finances. Oakland County court records show they owed Stricof & Polk $98,204.

Says Locricchio: "We couldn't get any financing through banks. We were up to here."

IN VIEW OF THESE difficulties and reports Pine Knob "is Mafia connected," Locricchio and Francell agreed to talk in depth about their financial affairs.

The financial difficulties were but part of their troubles, say Locricchio and Francell. At this time the FBI showed up to tell them they were going to be indicted.

The government agent who paid Pine Knob a visit was William F.X. Kane, of the FBI's Detroit field office. Kane testified in subsequent court appearances that he had been told to investigate the Pine Knob partners in the fall of 1972.

In the last eight years Pine Knob, in Oakland County, has developed from a losing ski resort into one of the nation's foremost entertainment complexes, worth millions. During these years the persistent question in Michigan and elsewhere has been "is it Mafia?" This is the third of four articles resulting from a two-months' examination by The News of Pine Knob's finances and ownership.

The reason for the FBI interest was a $200,000 loan Locricchio and Francell had received in July, 1972, from Detroit-area auto supplier William Magill. To hide the source, the money had been "washed" or routed through a Toronto financier.

Joseph Burnett, the financier, was known to the FBI as an associate of a Mafia moneyman (investor). The bureau was puzzled over why the $200,000 loan was deliberately obscured.

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The Pine Knob story — a brush with bankruptcy

Kane, who is on medical leave from the FBI and unavailable to News reporters, said in a 1978 court hearing that he could not recall the details of his conversation with the Pine Knob owners.

LOCRICCHIO, however, says he can:

"He told me that there's indictments on the desk (against Locricchio and Francell). He said, 'I can stop them.'"

But there was a catch. "'I want you to go to Las Vegas," Locricchio says the FBI agent told him: "'I want you to be my eyes and ears.'"

Specifically, Kane wanted a "snitch" who could "get close" to another case — the suspected hidden ownership of the Aladdin Hotel and Casino, Locricchio said.

The FBI had been tipped that the hotel was secretly controlled by two Detroit men, James "Occo" Tamer, a Mt. Clemens industrialist, and Charles "Chuckie" Goldfarb, millionaire Detroit bail bondsman.

Kane knew Locricchio had recently been offered a job by Tamer, the casino's entertainment director. Tamer wanted Locricchio to design and build a huge Theater for The Performing Arts, patterned after the Pine Knob Music Theater he had built in Michigan.

Locricchio says he turned down Kane and angrily ordered him out of his Pine Knob office. Then he accepted the job from Tamer.

NINETEEN MONTHS later, in May, 1977, Locricchio and Francell were indicted by a federal grand jury, charged with lying about the Magill loan on a mortgage application from a federally insured bank. They pleaded guilty and were fined $500. It is the only time either man has been convicted of a crime.

In August 1978, Tamer and Goldfarb were indicted on charges of conspiracy to illegally control the gambling casino. They, and two Las Vegas men, were convicted of the charges last month. Before that, Tamer's criminal record included a 1939 bank robbery conviction, for which he served 8½ years in state prisons. He is awaiting retrial. In an effort to clear his record of the 40-year-old charge, he now claims he was improperly advised of his rights.

The Pine Knob owners' connection stemmed from a close relationship between Locricchio and Tamer, a friendship that developed in the early 1970's at The Cedars, a downtown Detroit Middle Eastern nightspot.

Every Monday night, Locricchio says, he would have dinner there with Tamer and various Tamer friends. "He (Tamer) treated me like his son. At that time, I don't think there was anybody closer to Jimmy than I was. He liked me. He liked the things I was involved in. He liked the way I worked. We got along just great.

"So one day he stopped in my office with a rendering of the expansion of the Aladdin Hotel. And up to this time, I really didn't know Jimmy was involved in the Aladdin."

LOCRICCHIO said it was his idea to build a Pine Knob-like facility in Las Vegas. "'You'll control the entertainment industry,'" Locricchio said he told Tamer, "'because it's the only place a Neil Diamond will play, a Barbra Streisand, an Elton John.'"

Tamer liked the idea and, after several trips to Las Vegas, Locricchio said he was told to design a domed steel structure. But when other builders said it would take 18 months to two years to construct, the Aladdin owners balked.

"They said to me, 'Can you build this in six months?' I said, 'Yeah.' They said, 'Well we can't get a contractor. You got us into this, now get us out.'"

Locricchio estimated construction costs at $6 million. It ended up costing $10 million.

"I went to Nevada . . . I got my builder's license . . . We broke ground on about the 28th of January (1976) and played Neil Diamond on the Fourth of July. And this is the most elaborate theater . . . If I'd ever done anything in my life that had some divine providence attached to it, this was it."

An FBI affidavit filed in the Aladdin case quoted an unnamed informant as claiming that Locricchio was secretly offered a "piece" of the Aladdin in exchange for his work on the music theater. For awhile, sources say, the FBI questioned whether the $4 million cost overrun was possibly an illegal "bonus" to Locricchio.

LOCRICCHIO angrily denies an offer of ownership by Tamer and says he got $250,000 for designing and building the facility, "which was a drop in the bucket compared to what it was worth."

But money did come to Pine Knob through Locricchio's connection to Tamer, The News learned.

Records filed with the Oakland County clerk's office show that on Dec. 8, 1975, Locricchio and Francell received a $72,500 loan from a Mt. Clemens automobile supply firm, Zenith Industrial Corp. The company is owned by Tamer's family.

"That was before I went to the Aladdin (some five weeks before ground was broken in Las Vegas for the music theater)," Locricchio says. "Jimmy was a friend of mind. He had money and I knew it and I had my back up against the wall. Again, no banks . . . (would lend Locricchio money)."

The loan went to Pine Knob Investments, successor company to Indusco Corp., the founding Pine Knob firm.

Indusco, plagued by court suits and mortgage foreclosures, was dissolved on Oct. 1, 1975, with its assets and liabilities transferred to Pine Knob Investment.

On Oct. 2, 1975 — the next day — $720,000 in badly needed capital was pumped into Pine Knob Investment, records in Oakland County show.

THE MONEY WAS sent by John Patrico, Nicholas Ritz, Joseph Perfili, Richard DeCiantis and Angelo Colasanti. All are Macomb County businessmen. The first three are in the concrete business in Sterling Heights. The last two are partners in a Roseville floor covering company.

All, say Locricchio, are long and close friends of Pine Knob's partners. In exchange for the $720,000, the five were made limited partners in Pine Knob Investment.

Perfili and Colasanti refused to answer questions about their involvement in Pine Knob when contacted by The News. John Herrington, an attorney who represents the five, said his clients are no longer partners in Pine Knob. "Nobody's interested in talking to anybody (about Pine Knob)," Herrington said of his clients.

Locricchio says none of the five are limited partners any longer.

"Since that time (when they became involved in Pine Knob), they have been audited by the IRS, they have been subpenaed by grand juries and it (was) suggested by their attorney that if they got away from us the heat would end," said Locricchio.

In January, 1978, the five were given a mortgage on Pine Knob for $1.4 million and they surrendered their limited partnerships, according to Oakland County property records.

"THEIR EQUITY MAY have been worth more," Locricchio conceded. "(But) they wanted out."

Locricchio and Francell say they almost lost Pine Knob because of the government harassment in 1975. The FBI subpenaed records from at least four of their banks and questioned banking personnel, frightening off investors, they charge.

At one point that year, things were so bad that Locricchio said he discreetly inquired whether Oakland County would be interested in buying the resort. The talks went nowhere.

"Personal friends (pulled us through)," he said. "That was our source of financing — people that we knew, personal friends who believed in us."

The intensive FBI and IRS investigations have been difficult on their families, the two say. Locricchio is married and lives with his wife and four children, aged eight to 17, in Bloomfield Hills. Francell is in the midst of a second divorce. He lives in St. Clair Shores but spends several nights a week at Pine Knob. He has a 19-year-old daughter.

"INNUENDO PREVAILS all over your life," says Locricchio. "I honestly believe sometimes my mother really thinks that somewhere in the background, maybe there's something to this."

Locricchio has testified before three federal grand juries. Francell has been called twice.

"If you've never experienced it, it's something that you got to see," says Locrocchio. You walk in, you sit down in front of 16 housewives or postmen or whatever. And, I'm not demeaning them, but there's no way they can delineate or be analytic about your financing.

"You say $17 million in front of them, they think Mafia."

Tomorrow: The empire expands.

[PAGE 1-A–THE DETROIT NEWS WEDNESDAY, APRIL 25, 1979]

THE PINE KNOB STORY

Partners stalked by Mafia-hunters

By MICHAEL F. WENDLAND and JEAN GADOMSKI — News Staff Writers

The owners of Pine Knob entertainment complex in Oakland County are bouncing back from near bankruptcy and a public impression they are "Mafia."

Partners Joseph J. Locricchio and Gary Francell are planning another Pine Knob development "in the South." (The exact location has not been announced).

"It'll be just a dynamite amenity — if we can pull it all together," Locricchio says.

And the Nederlander Theatrical Corp., which has a lease to the year 2000 with Locricchio and Francell, is planning to expand the Pine Knob music theater concept to suburbs of Dallas and Chicago. Locricchio and Francell are unsure what, if any, role they will play in these developments.

"The guys are essentially land gamblers," says Joseph Z. Nederlander, who runs the Detroit end of the theatrical empire controlled by five Nederlander brothers.

In the last eight years Pine Knob, in Oakland County, has developed from a losing ski resort into one of the nation's foremost entertainment complexes, worth millions. During these years the persistent question in Michigan and elsewhere has been "is it Mafia?" This is the last of four articles resulting from a two-months' examination by The News of Pine Knob's finances and ownership.

"**THEY'RE FINALLY** getting on their feet (despite) all this talk about their so-called Mafia associations. Geez. People will never know what they went through just to make ends meet. Everything is mortgaged to the hilt. I mean *everything*. They ain't got 20 cents between them."

Nederlander says the Mafia rumors that have followed Locricchio and Francell delayed Pine Knob's success.

"I had the FBI talk to me (about them). The IRS talked to me. They went over them, under, crossways and sideways. And there's really nothing that they can make on these guys. I feel sorry for all they've suffered."

Locricchio and Francell believe they have turned the corner.

"We ain't the Rock of Gibraltar yet," Locricchio says. "But let me tell you one thing: Pine Knob and the entities of Pine Knob are so strong that in spite of all (the problems), we're going to overcome. There's no doubt now."

THEIR STAGGERING debt, which at its peak totaled $17 million and almost bankrupted the complex, has been whittled down to about $7.5 million, the two say.

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THE PINE KNOB STORY

Mafia-hunters stalk Locricchio, Francell

"We still have a long line (of creditors) at disbursement time," Locricchio says. "It looks like the Last Supper . . ." meaning the creditors are gathered around Locricchio and Francell.

Last year, the proceeds from the Pine Knob Music Theater alone brought the two $1.6 million. The contract Locricchio and Francell have with the Nederlanders gives them 80 percent of the annual profits and $60,000 yearly rent.

The ski resort turned a $700,000 profit in 1977-78, Locricchio says. With the completion of a championship 18-hole golf course, the Pine Knob Golf and Country Club is beginning to boom. And the Borg Warner Corp., a manufacturer with diversified interests, is actively involved in selling Pine Knob Homes, a village of luxury $161,000 to $300,000 condominiums.

LAST MONTH, the partners announced they intend to build a 21-story hotel at Pine Knob.

Locricchio says he has almost grown accustomed to the attention of federal agents. "I know the surveillance is there and they have me listed as a suspected organized crime figure," he says.

Locricchio believes most of the problems stem from his Sicilian heritage and his business success. While he says he wouldn't recognize convicted crime figures like Anthony Zerilli or Michael Polizzi, who federal agents once thought had a secret ownership interest in Pine Knob, he concedes knowing other alleged Mafia members.

Among them are Jack Tocco and Dominic Corrado, who have been identified in 1969 U.S. Senate testimony as Detroit Mafia leaders. Neither has been convicted of a crime.

"SURE," SAYS Locricchio, "I know them very well . . . but let me tell you the way I feel about that. I never in my life have known them to do anything bad . . . I don't know anything about their fathers, back in the days of bootlegging."

It is guilt by association, Locricchio says. "That's the problem with the Italian-American today. What we need to do — like the blacks — is join together. There's 12 million of us. Then, nobody would (bother) with us.

"But we don't do that. We have individual goals, individual jealousies, and everyone suspects the other one."

Locricchio and Francell say it is this attitude and the harassment from government agencies that is forcing them to expand the Pine Knob concept elsewhere.

"At least in (other communities) I'm respected," Locricchio says. "It's different than here. I mean, the city officials teated me well (in other places), I had newspapers that treated me well and I could walk with pride, you know. Here, I sneak from closet to closet."

Locricchio and Francell have been close friends — since they were 16 years old on Detroit's east side — as well as effective business associates.

LOCRICCHIO IS the more outgoing and agressive of the two.

"But he (Francell) doesn't give me my way like everyone thinks," says Locricchio. "Gary is not the passive partner who lays back and lets me do whatever I want."

"If it weren't for Gary, there wouldn't be a Pine Knob. Undoubtedly, I would have gone out on too many tangents. He controls the octopus — me. He puts up with

the fact that I have 20 members of my family on the Pine Knob payroll — my father, my brother, my cousins."

Locricchio's is an extremely large family and there are a considerable number of other Joseph Locricchios in the Detroit area, which has been known to confuse police and journalists.

"The basic reason is that in a Sicilian family, you name the first-born son after the father's father and the second-born after the mother's father. So everywhere there's a Joe Locricchio," he explains.

"As to who the other Joe Locricchios are, I don't know. But basically, we're all related. We're all first cousins or second cousins. My parents, my mother's family and my father's family are very large. It's like we were going to multiply and cover the earth. Mostly all are men. So there are a lot of Joe Locricchios. There's a lot of confusion."

TOGETHER, Joseph J. Locricchio and his partner, Francell, travel a great deal, usually on business. The two, both skin divers, often vacation together. They have year-round suntans. Locricchio has his own airplane, a six-seater twin-engine.

The two say their dreams for Pine Knob are almost realized. The planned hotel — the roof of which would serve as the top of a ski slope — would insure year-round crowds.

"It will solidify our whole business," says Francell. "We'll never have a soft year again."

But several obstacles remain. The partners have to find financing for the hotel's estimated $20 million construction costs. Also, there is growing community opposition from Clarkston-area neighbors who disapprove of the Pine Knob crowds.

And the partners worry that the intensive law enforcement investigations into their activities over the last eight years will continue to haunt them.

"We're gun-shy," says Locricchio. "The hotel is conceptual at best right now. We think we need it to round Pine Knob out. But we're not going to go through the living hell that we have (in the past).

"If we get too much flak or too much pressure, I'm going to say, 'see you later' and let somebody else build it. I'll go to another community."

(2)

No. 91-1156

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In The

Supreme Court of the United States

October Term, 1991

JOSEPH J. LOCRICCHIO and GARY FRANCELL,

Petitioners,

vs.

THE EVENING NEWS ASSOCIATION, INC., MICHAEL F. WENDLAND and JEAN GADOMSKI,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Michigan

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

In this public interest libel case, where petitioners conceded that they could not prove false any specific statement contained in the disputed articles, and where petitioners conceded that their names appeared on law enforcement organized crime lists, that they had personal friendships with numerous individuals whose names are commonly associated with organized crime, and that they had extensive business dealings with those individuals, did the Michigan Supreme Court err in holding that petitioners failed to sustain their burden of proving false the implication allegedly arising from the articles that petitioners had "some kind of connection with organized crime?"

CERTIFICATE PURSUANT TO SUPREME COURT RULE 29.1

At all times relevant, respondents Michael Wendland and Jean Gadomski were reporters for The Detroit News, and the Evening News Association was the publisher of The Detroit News.

On February 18, 1986, The Evening News Association merged with Gannett Michigan, Inc., with The Evening News Association being the surviving corporation. On February 19, 1986, The Evening News Association changed its name to The Detroit News, Inc., and it has been the publisher of The Detroit News since that date. The Detroit News, Inc. states that (1) it is a wholly owned subsidiary of Gannett Co., Inc.; (2) it has no subsidiaries other than wholly-owned subsidiaries; and (3) its affiliates are the other subsidiaries of Gannett Co., Inc.

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STATEMENT OF THE CASE

Introduction

In a four-part newspaper series beginning on April 22, 1979, and running through April 25, 1979, The Detroit News reported on the development by petitioners Gary Francell and Joseph Locricchio of the Pine Knob resort in southeastern Michigan. The series ("The Pine Knob Series"), investigated over several months by two veteran Detroit News reporters, Michael Wendland and Jean Gadomski, culminated with a one-and-a-half hour taped interview with Locricchio, Francell, and their attorney in which petitioners openly discussed their relationships with organized crime figures and the role of organized crime in the financing of Pine Knob.

Despite their inability to prove a single published statement in the Pine Knob Series false, petitioners nonetheless contend that the articles falsely "portrayed Locricchio and Francell as members or associates of the Mafia, linked them with two unsolved murders, and suggested that their development and operation of Pine Knob had involved them in a series of questionable and/or illegal financial transactions." (Pet. 7)[1] Notwithstanding petitioners' contention, the trial record demonstrated that Joseph Locricchio and Gary Francell associated with organized crime figures, borrowed money from and laundered money through organized crime figures, did business with organized crime figures, were linked with two unsolved murders, and conducted their lives to the point that — as Joseph Locricchio himself told The Detroit News — they were listed on federal law enforcement computers as "suspected organized crime figures."

---

1. The following abbreviations are used in this Brief: "Pet." for the petition for a writ of certiorari; "Pet. App." for the appendix filed with the petition; "Mich. App." for the appendix filed by respondents with the Michigan Supreme Court; and "Resp. App." for the appendix filed with this brief in opposition.

I. Prior Proceedings

On March 14, 1980, ten months after publication, petitioners demanded a retraction; on April 3, 1980, petitioners filed suit. Petitioners sued over the Pine Knob Series and seven other Detroit News reports published between April 27, 1977, and April 25, 1979. Two amended complaints were subsequently filed. Although all versions of the complaints contained multiple counts and alleged multiple causes of action, the libel counts were the focus of the litigation.

None of the complaints identified any specific factually false statements printed in any of the eleven Detroit News reports.

In April, 1981, respondents moved for summary judgment, *inter alia,* asserting the complaint's failure to specify specific false and defamatory statements. The motion was denied.

Respondents filed interrogatories requesting petitioners to "Identify with particularity each and every statement [in each of the respective articles in the Series] you claim contains false statements of fact . . . ." Petitioners objected to this set of interrogatories, but the court denied petitioners' objections. Petitioners then answered as follows:

> In regard to Interrogatory 1(a), plaintiffs, JOSEPH JUDEAS LOCRICCHIO and GARY FRANCELL, state that they have been advised by their attorneys that the defamation allegations contained in said Complaint are not necessarily based on a false statement(s) in any one particular article, but rather, that the entire series of articles, in their entirety, injured the reputations of plaintiffs as the same represented a false portrayal, implication, imputation and/or insinuation that

> plaintiffs, among other things, are or were members and/or associates of an organized criminal society, otherwise known as the "Mafia"; individuals of low moral and character [sic]; that the plaintiffs knowingly and purposely engaged, participated and/or authorized financial agreements and/or arrangements of a questionable nature and/or legality and that the plaintiffs' names and reputations were unjustifiably associated with other criminal conduct and/or activity of a reprehensible nature.

(Mich. App. 80a).

Respondents again moved for summary judgment on the grounds that petitioners had failed to identify a single false statement of fact in the entire Pine Knob Series. Petitioners opposed the motion on the basis that the allegedly false implications and innuendos arising from the publications could support a libel claim despite the absence of alleged false statements of fact. The circuit court denied respondents' motion.

The Michigan Court of Appeals granted respondents' application for interlocutory appeal, but held that the pleadings raised a genuine issue as to whether the articles carried a defamatory insinuation that petitioners were associated with organized crime. (Pet. App. A-82) Respondents' motion for rehearing and interlocutory application for leave to appeal to the Michigan Supreme Court were denied. Respondents filed an interlocutory petition for certiorari in this Court, which was also denied.

Trial proofs began on July 22, 1985. At the conclusion of all proofs, the court granted respondents' motion for directed verdict as to all remaining counts except the libel counts and as

to all eleven publications except the Pine Knob Series. The court took the motion, as it pertained to the Pine Knob Series, under advisement.

On September 4, 1985, the jury returned special verdicts finding respondents did not "make the statement of fact complained of . . ." as to petitioner Locricchio, but finding for petitioner Francell in the amount of three million ($3,000,000) dollars. (Pet. App. A-192)

Following post-trial briefing, the trial court issued a written opinion on December 11, 1986, directing a verdict in favor of respondents on the petitioners' libel claims. The trial court "accepted the facts as submitted by plaintiff" and "viewed the evidence in the light most favorable to plaintiff." (Pet. App. A-91) Against this standard, the trial court held that "The Plaintiffs have failed to prove [that the Pine Knob Series] contained significantly false facts." (Pet. App. A-88) The trial court noted that petitioners "urge[d] the Court to disregard the underlying facts" and that petitioners argued the "inferences which may be drawn from the articles . . . comprise the false statements constituting the defamation." (Pet. App. A-89) The trial court rejected this argument holding that ". . . inference may be as defamatory as a direct assertion . . . [but] liability cannot be imposed for journalistic inferences arising from the reporting of true facts about matters of public concern." (Pet. App. A-89) In Appendix C to its opinion, the trial court listed fourteen facts which are true — or at least petitioners have not proven false — including:

- Petitioners purchased Pine Knob from individuals who had been indicted for concealing their ownership in a Las Vegas hotel;

- Petitioners' names appeared on the organized crime lists;

- Petitioners were personal friends of or had done business with innumerable persons whose names are commonly associated with organized crime.

(Pet. App. A-108-A-110).

Petitioners appealed to the Michigan Court of Appeals, which reversed. The court of appeals did not consider the trial record. Instead, it ruled that its 1983 pretrial opinion, holding that the Pine Knob Series was capable of defamatory interpretation, constituted the law of the case and was dispositive. (Pet. App. A-119) Respondents' motion for rehearing was denied.

The case was accepted for review by the Michigan Supreme Court. On August 26, 1991, the Michigan Supreme Court issued its opinion reversing the court of appeals' decision and reinstating the trial judge's directed verdict.

The court's ruling, expressed in an opinion by four of the six sitting Justices and a concurrence by the Chief Justice, was based on petitioners' admitted failure to prove falsity of the statements published by The Detroit News. The four-justice majority of the Michigan Supreme Court concluded that there was "a lack of proven falsity" in "the underlying facts." (Pet. App. A-4) Chief Justice Cavanaugh agreed, stating that "plaintiffs have conceded the truth — or at least that they are unable to prove the material falsity — of all the *specific factual statements* contained in the four disputed articles." (Pet. App. A-51 (emphasis in original)) Indeed, at oral argument, petitioners' counsel conceded that "the literal words used is not what we're basing our complaint on . . . " (Resp. App. A-1)

The Michigan Supreme Court further concluded that petitioners failed to prove that the Pine Knob Series created any false implications: "[u]nfortunately for plaintiffs, an inescapable

implication of the Pine Knob series conforms to the facts developed at trial: the plaintiffs had numerous financial and social connections with organized crime figures and these associations contributed in the financing of Pine Knob and prompted intense investigative scrutiny, if not harassment, from law enforcement authorities." (Pet. App. A-43)[2] Petitioner's motion for rehearing was denied.

II. Statement of Facts

Introduction

Petitioners contend that, "viewed in their entirety, the articles portrayed Locricchio and Francell as members or associates of the Mafia, linked them with two unsolved murders and suggested that the development and operation of Pine Knob had involved them in a series of questionable and/or illegal financial transactions." (Pet. 7)

In summary, the relevant trial proofs showed that:

- Petitioners purchased Pine Knob on land contract from a partnership in which two of the partners were named in a federal Organized Crime Strike Force indictment. This caused the FBI and police to open investigative files on petitioners.
- Almost immediately after purchasing Pine Knob, petitioners needed additional cash. They borrowed $200,000 and hid the source of the loan with the assistance of a Toronto organized crime associate.

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2. At trial, petitioners offered only one witness to testify concerning the implication of the Pine Knob Series. Robert Bjork, petitioners' psychologist expert witness, opined that the implication of The Detroit News' article was that petitioners have "some kind of connection with organized crime." (Pet. App. A-17)

- Four months later, the bookkeeper of the $200,000 lender was found murdered. Petitioners' names surfaced in the investigation of that murder.

- Petitioners were also social and business associates of one Harvey Leach, whose company had financial connections with the same individuals who had arranged the prior loan. Leach was subsequently found murdered in the trunk of his car.

- The continuing law enforcement interest in petitioners also stemmed from their financial and business relationships with identified organized crime figures. Petitioners purposely disregarded an FBI warning to stay away from these figures and from a development role in the Aladdin Hotel in Las Vegas.

- Petitioners were subpoenaed to numerous grand juries and were ultimately indicted for loan fraud. Eventually, petitioners pled guilty to a lesser charge in connection with the hidden loan. Throughout this period, petitioners' names appeared on the organized crime lists of the FBI and petitioners complained of FBI "harassment."

A more detailed analysis of these relevant trial proofs follows.

A. The Purchase of Pine Knob

In December, 1971, petitioners purchased the Pine Knob ski hill on land contract financing from a partnership in which two of the partners were named in a federal Organized Crime Strike Force indictment for attempting to purchase hidden interests in a Las Vegas hotel and casino for two individuals who had been identified in United States Senate testimony as the heads of the

Detroit Mafia. (Mich. App. 194a-195a, 245a-249a)[3] These partners financed over one million dollars of the $1,550,000 total purchase price. (Mich. App. 400a-407a) In December of 1971, the Michigan State Police Intelligence Unit opened a file on petitioners (Mich. App. 769a-770a); in January of 1972, the Federal Bureau of Investigation opened a file on petitioners (Mich. App. 748a).[4]

Following this purchase, petitioners vastly expanded Pine Knob. They added condominiums, restaurants, golf facilities, and an outdoor music theater. These expansions resulted in a series of financial crises, one of which led to the "Magill loan."

B. The Magill Loan

In July, 1972, Locricchio and Francell became, in their words, "desperate" for cash. (Mich. App. 214a and 376a) Through an associate, they were connected to William and Joyce Magill, who, while unacquainted with Locricchio and Francell, agreed to loan them $200,000.00 in currency. (Mich. App. 376a) According to Locricchio, Magill did not want to be known as ths source of this loan. (Mich. App. 377a)

To hide the source of the loan, petitioners turned to a man

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3. In the past, petitioners have argued that they first purchased land for Pine Knob from a physician rather than from anyone associated with organized crime. The land records, purchase agreement, and petitioners' own contemporaneous financial statements confirm, however, that the ski hill, bought from the partnership, was the first property purchased by the petitioners. (Mich. App. at 408a, 414a, 619a, and 626a-630a)

4. At various times and continuing in this Court, petitioners have claimed that rumors of organized crime at Pine Knob were created by a February 1972 Detroit News sports columm. (Pet. 9) Uncontroverted trial testimony by the FBI and Michigan State Police established that their investigations of petitioners predated the sports coverage. (Mich. App. 748a, 769a-770a)

named Fred Gordon, who arranged for Francell to drive the Magills' $200,000.00 in currency to Toronto. In Toronto, the $200,000.00 in currency was given to one Joseph Burnett as "collateral" for a $200,000.00 "loan" from Burnett's company. Burnett has been identified as a known associate of organized crime figures, including Mafia financial wizard Meyer Lansky. Petitioners returned to Detroit with a $200,000.00 Canadian loan; the Magills had been washed from view as a source of the loan. (Mich. App. 421a-422a, 378a-382a, 214a-217a, and 219a-220a) According to Locricchio, this loan was finally paid off in 1977 when the Magills sued because they "wanted the FBI off their back." (Mich. App. 384a)

C. The Agnes Brush Murder

In October of 1972, Magill's bookkeeper and sister-in-law, Agnes Brush, was found slain at Magill's office. Petitioners' names surfaced in the investigation of that murder. In discussing the Brush murder with The Detroit News reporters, Locricchio stated: "I think that's how the FBI got involved with us [with regard to the Magill loan]." (Mich. App. 219a) It should be noted that the Pine Knob Series stated that "[t]he only suspect was the 61-year-old laborer who worked with Miss Brush." (Pet. App. A-123)

In 1973, petitioners were subpoenaed by the United States Organized Crime Strike Force to the first of a series of federal grand jury appearances. At the trial of this matter Locriccio testified that, during several days of 1973 grand jury testimony, he was questioned about partnerships with known Detroit organized crime figures (Mich. App. 447a-450a, 270a), and both he and Francell were required to produce information and records related to Pine Knob, their banking records, and the Magill loan. (Mich. App. 279a-282a, 537a-542a) By March of 1973, petitioners would complain to the FBI that they "were tired" of hearing rumors that "organized crime or mafia" was connected with their

business. (Mich. App. 450a-452a)

D. The Harvey Leach Murder

In 1974, petitioners became involved in building warehouse-type furniture outlets with Harvey Leach, the then-President of the Joshua Doore Furniture chain in Detroit. They were introduced to Leach by Fred Gordon. (Mich. App. 572a-579a) According to Locricchio, he and Leach had become "as close as we could get . . . " (Mich. App. 218a)

Gordon had also introduced petitioners to an ex-convict named Leonard Schultz who was a "labor consultant" to the Doore Chain and Harvey Leach. (Mich App. 198a) In 1969, petitioners, through Gordon, had obtained a $129,000.00 unsecured loan from Schultz. (Mich. App. 366a-367a) Schultz was a friend and confidant of identified organized crime figures in Detroit.

In March, 1974, Leach was found almost decapitated in the trunk of his car. He had last been seen en route to a meeting at Schultz' home. (Mich. App. 197a-198a) Schultz came into the public eye again in 1975 when he was identified as one of the men that Jimmy Hoffa said he was to meet the day he disappeared. (Mich. App. 199a-200a)

The Leach murder, which was the subject of state and federal investigations, remains unsolved. Days prior to Leach's murder, Fred Gordon had arranged new financing for the Doore chain through the same Joseph Burnett who had participated in hiding the source of the Magill loan. (Mich. App. 294a, 250a-251a) In 1977, these business and personal connections involving Locricchio and Francell, Gordon, the Magills, Schultz, Burnett, and Leach had been broadcast in detail by the Canadian Broadcasting Corporation in an organized crime expose called "Connections: A Study of Organized Crime in Canada."

In 1975 petitioners again were subpoened to federal grand juries. (Mich. App. 448a-447a, 645a-646a)

E. The James Tamer and Aladdin Hotel Connection

Part of the continuing law enforcement interest in petitioners stemmed from their financial and business relationships with James "Occo" Tamer, a convicted bootlegger, bank robber, bookmaker, and gambler with high level organized crime associations. (Mich. App. 300a-306a, 267a, 268a) Locricchio described Tamer as a "very good friend of mine." (Mich. App at 392a) On several occasions in 1975 Tamer loaned petitioners money at a time when they were "shut out" of bank financing. (Mich. App. 395a-396a)

Also in 1975, Tamer, then the entertainment director of the Aladdin Hotel and Casino in Las Vegas,[5] asked Locricchio to design and build a performing arts center there. (Mich. App. 434a-436a) An FBI agent had told Locriccio that the FBI was investigating organized crime involvement at the Aladdin Hotel and Casino.[6] Locricchio acknowledged that he purposefully disregarded an FBI warning to stay away from Tamer, the Aladdin, and the "bad people" out there. (Mich. App. 271a-275a, 309a-315a) According to Locricchio, his response to this advice was to tell the FBI agent " . . . to get fucked. And don't ever come back. Don't ever get in my face again." (Mich. App. 225a) Locricchio moved to Las Vegas and designed and built a multi-million-dollar entertainment center for the Aladdin. Locricchio's

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5. A position shortly thereafter to be occupied by entertainer Wayne Newton and the subject of another libel suit. *Carson Wayne Newton v. NBC*, 930 F.2d 662 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 192 (1991).

6. This investigation culminated in 1978 with the indictment and later conviction of Tamer, and other individuals linked with Detroit organized crime, on charges relating to hidden interests in the Aladdin Hotel.

fees from the Aladdin project were funneled into Pine Knob. (Mich. App. 444a-445a)

F. The Claims of FBI Harassment

In 1975, ths FBI subpoenaed records from at least four of petitioners' banks and interrogated banking personnel. According to Locricchio, the FBI harassment was a "pretty consistent thing at that point in time in my life." (Mich. App. 398a) Locricchio testified in court that the FBI had told third parties he was a "crook." (Mich. App. 270a-276a, 315a) Petitioners' attorney detailed FBI visits to several of petitioners' lenders at which the FBI reportedly told bank officials that petitioners were "mob." (Mich. App. 283a-286a, 326a-328a)

Petitioners' problems with banks were not limited to government harassment. A 1978 bank credit memorandum described petitioners as "high livers" and concluded that "It is suspected, although not factual they are involved in underworld activities" and "It is suspected that the business (Pine Knob) is used for the laundering of money." Another memorandum of the same bank documented a telephone call with another major Detroit bank reporting that "They are aware of certain underworld ties through associations the principals have had . . ." (Mich. App. 354a-355a, 359a-360a, 364a-365a)

G. The Indictment and Guilty Plea

In 1977, a federal grand jury handed up criminal indictments against petitioners on charges presented by the U.S. Organized Crime Strike Force (Mich. App. 453a, 809a-810a, 464a-467a) for loan fraud relating to petitioners' failure to reveal the Magill loan in a subsequent bank loan application. In October, 1978, Locricchio and Francell pleaded guilty in federal court in Detroit to a charge relating to the Magill loan. (Mich. App. 464a,

481a-508a; 484a, 505a, 533a-537a, 650a, 713a)

H. The Detroit News Investigation

In 1978, Wendland was assigned to investigate the rumors of organized crime involvement at Pine Knob. Respondent Wendland was a veteran Detroit News reporter with extensive experience covering organized crime both in Detroit and nationally. After some initial work in 1978, he advised his editors that researching Pine Knob would take time and resources not then available. The time and resources became available in January of 1979, when respondent Jean Gadomski was teamed with Wendland and they began their research into the Pine Knob story. Their pre-publication research efforts culminated in a prearranged, on-the-record, 1-1/2 hour taped interview with petitioners and their attorney in April, 1979. Following the interview, and another interview with petitioners' attorney in Chicago, they wrote the Pine Knob Series, which was published from April 25-29, 1979.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

The Michigan Supreme Court did not have to look very far to determine that petitioners could not prove any specific factual statements to be false: petitioners conceded as much. As a result, the review conducted by the court was actually quite limited and was unquestionably proper. Nor did the court have to look very far to determine that the claimed implication as defined by petitioners' expert (*i.e.*, that they had "some kind of connection with organized crime") followed ineluctably from the true facts.

While petitioners decry the Michigan Supreme Court's action in reviewing the record to determine whether petitioners carried their burden of proving falsity, the court could have done no less.

See Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984):

> [W]e have repeatedly held that an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression."

The underlying logic of this simple requirement in First Amendment cases is inescapable. *See Bose,* 466 U.S. at 501, n.17:

> Regarding certain largely factual questions in some areas of the law, the stakes — in terms of impact on future cases and future conduct — are too great to entrust them finally to the judgment of the trier of fact.

Given petitioners' admitted failure to prove factual error in what had been published, the constitutional mandate to review the entire record, and the importance of the First Amendment values involved, the conclusion of the Michigan Supreme Court that petitioners had not borne their burden of proving falsity was not an impermissible intrusion upon the jury. To the contrary, this conclusion was the necessary consequence of petitioners' own admissions and the trial proofs.

I.

THE SUPREME COURT OF MICHIGAN DID NOT ERR IN THE STANDARD OF REVIEW IT APPLIED TO THIS CASE.

A. Due to Petitioners' Complete Failure to Prove Factual Falsity, the Review Conducted by the Supreme Court of Michigan Was Limited and Proper.

Petitioners state that the Supreme Court of Michigan "eviscerate[d] the role of the jury" and assumed "the role of super-jury and appellate fact-finder . . ." (Pet. 22) Petitioners suggest that the court below engaged in an unharnesssd and far flung reexamination of the trial record. This is a gross mischaracterization of what the Michigan Supreme Court said and did.[7]

In light of petitioners' admissions and the trial proofs, the Supreme Court of Michigan did not have to grapple with questions about the proper limits of independent appellate review.

1. Petitioners' Failure to Prove False Statements.

The court certainly did not have to conduct an extensive review to determine whether petitioners had proved any specific facts false. In interrogatory answers, petitioners never pointed to a single false fact in the entire series of articles. At trial, they proved no published statement false. In answer to questions in

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7. The court held that "in reviewing a libel verdict an appellate court does not and should not exercise review of credibility determinations, disregard previous factfindings, or create new factfindings." (Pet. App. A-25 n.17) The court further emphasized that "[t]he task of the reviewing appellate court in a libel case is not to conduct an inquiry regarding who did what to whom . . ." (Pet. App. A-26 n.17)

the Michigan Supreme Court, petitioners' counsel conceded that "the literal words used is not what we're basing our complaint on . . ." (Resp. App. 2a) Chief Justice Cavanaugh summarized the record: "plaintiffs have conceded the truth — or at least that they are unable to prove the material falsity — of all the *specific factual statements* contained in the four disputed articles." (Pet. App. A-51 (emphasis in original)) Thus, regardless of whether independent appellate review of falsity is generally required in public interest libel actions, in light of the unique admissions in this case such review was not required to conclude that petitioners failed to prove any specific published statement to be false.

2. Petitioners' Failure to Prove False Implications.

The petitioners' proofs were equally weak as to the false implications that they claimed arose from the Pine Knob Series. They offered no support for their claim that a reader of the Pine Knob Series would infer that they were "members of the Mafia." The cognitive psychologist expert petitioners produced to support this claim rejected it in his trial testimony. Rather, Prof. Bjork testified that the Pine Knob Series merely gave rise to an implication that petitioners "had some kind of connection with organized crime." (Pet. App. A-17) As the Michigan Supreme Court observed, the undisputed published facts proved that implication to be true:

> Unfortunately for the plaintiffs, an inescapable implication of the Pine Knob series conforms to the facts developed at trial: the plaintiffs had numerous financial and social connections with reputed organized crime figures and these associations contributed in the financing of Pine Knob and prompted intense investigative scrutiny, if not harassment, from law enforcement authorities. Although capable of defamatory

> interpretation, the implications alleged by the plaintiffs do no arise from false facts or material omissions, and, standing alone, are not even proven by the plaintiff to be false.

(Pet. App. A-43, A-44)

To support their implication claim, petitioners repeatedly suggest that Wendland did not believe they were members of the Mafia. (Pet. 5, 9) This is utterly beside the point since The Detroit News never stated that petitioners were Mafia and since petitioners' own expert, Prof. Bjork, did not conclude that the articles implied they were members of the Mafia. Furthermore, Wendland in fact testified as follows:

> I don't think there's organized crime involvement in the ownership of Pine Knob. *I think organized crime has been involved in the — in helping your clients finance Pine Knob,* and I also testified I don't think your clients are organized crime members. (Pet. App. A-136)

It can hardly be denied that organized crime connections played a role in the financing of Pine Knob, ranging from the land contract financing of petitioners' original purchase of Pine Knob, to taking a suitcase with $200,000 currency to a known organized crime associate in Toronto, to the loans from James Tamer when petitioners were shut out of the banks.

It is also impossible for any reasonable person to review the undisputed trial record without concluding that these petitioners were a target of the FBI and the United States Organized Crime Strike Force. As detailed in the Statement of Facts at 7 to 13, *supra,* law enforcement attention regarding petitioners began in

1971 and intensified through their indictment.[8] So pervasive was the law enforcement interest in them that Locricchio's voice can be heard in the tape recorded interview — as clear as a bell — summarizing the situation as follows:

> I know the surveillance is there, and they have me listed as a suspected organized crime figure.
>
> * * *
>
> I honestly believe sometimes my mother doesn't really think that somewhere in the background, you know. She, she said to me, would you have anything to do with them? After all, she's thinking, my god, why, why does it keep up and why the grand juries and why this and why the indictment. She said, tell me son, tell me, you know. So my mother, in the back of her mind, suspects, but she's absolutely mad and she's, you know, as far as hating, I mean, my mother is literally, she believes it but she has her moments of doubt.

(Mich. App. at 243a-244a)[9]

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8. Petitioners take issue with the headline stating that they were "stalked by Mafia hunters." As the preceding factual discussion reveals, however. this is a rational summary of what occurred: law enforcement agencies who pursued organized crime figures were, indeed, pursuing the petitioners. In any event, as the Michigan Supreme Court concluded, to the extent that the phrasing of this headline is "arguably inflammatory" is "falls into ths category of permissible rhetorical hyperbole.' (Pet. App. A-44, A45)

9. The Detroit News aptly summarized this rambling and ungrammatical statement as "even my mother sometimes has her doubts." (Pet. App. A-198) Petitioners state that Wendland "admitted" that this "was not an accurate report

(Cont'd)

Petitioners also contend that the Pine Knob Series "linked them with two unsolved murders." (Pet. 7) Again, however, petitioners' own expert witness on the implications of the Pine Knob Series did not support this claim. Rather, he testified that "I don't believe [readers] would necessarily conclude that Mr. Locricchio and Mr. Francell were involved personally in some way." (Pet. App. A-16) Further, the undisputed proofs show that there were numerous documented common elements in both of the murders involving individuals who had been involved with petitioners' business and financial transactions.[10] So remarkable are these common elements that petitioners themselves revealed them to their attorney, who in turn reported these revelations to Wendland and Gadomski during the pre-publication interview in petitioners' presence:

> They come into my office, sit down and . . . they start telling me these things (about the Magill loan and Leach's murder). Well, there's Harvey in the trunk of the car, and then we went to Toronto and . . . Holy smokes!

(Mich. App. 176a, 217a).

(Cont'd)
of Locricchio's remarks." (Pet. 6, n.2) To the Contrary, Wendland testified "I think that's an accurate quote of what Mr. Locricchio was telling us." (Pet. App. A-139)

10. Petitioners' statement that Wendland "admitted that he never encountered the partners' names during his investigation" [of the 1974 Leach murder] is wrong. Wendland testified that "I had attempted to talk to your clients back during the Harvey Leach story" because of their financial connection to Leonard Schultz who was the leading suspect. (Pet. App. A-127-A-129, Mich. App. 250a-251a) What Wendland did not learn until 1979 was petitioners' personal and business involvement with Leach (Pet. App. A-129) in the siting, design, and construction of the Joshua Doore stores.

In sum, this case does not present complex questions concerning the proper scope and interpretation of independent appellate review. Rather, this is a case in which any standard of review that examined the sufficiency of the evidence would have dictated the same result: that the "inescapable implication of the Pine Knob Series conforms to the facts developed at trial . . ." (Pet. App. A-43) Indeed, even the trial judge — who applied a standard under which the evidence was viewed in the light most favorable to plaintiffs — granted respondents' motion for directed verdict in light of petitioners' clear failure to prove falsity.

B. The Supreme Court of Michigan Correctly Interpreted the Decisions of this Court and the Doctrine of Independent Appellate Review.

Even if the doctrine of independent review were essential to the decision below, however, it is abundantly clear that the Supreme Court of Michigan correctly analyzed and applied that doctrine.

1. This Court Has Required Independent Review of Determinations that Speech Falls Within a Constitutionally Unprotected Category.

This Court has recognized that "the freedom to speak one's mind is not only an aspect of individual liberty — and thus a good unto itself — but also is essential to the common quest for truth and the vitality of society as a whole." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 48, 50-51 (1987) (*quoting Bose*, 466 U.S. at 503-504). Nevertheless, this Court has also held that "there are categories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend." *Id.* at 504. Those unprotected categories include "fighting words," *Street v. New York*, 394 U.S. 578, 592 (1969), incitement to riot, *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969),

obscenity, *Roth v. United States*, 354 U.S. 476, 487 (1957), child pornography, *New York v. Ferber*, 458 U.S. 747, 764 (1982), and libel, *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1982).

The question of whether a specific communication receives "the majestic protection of the First Amendment" is clearly one of constitutional moment. Accordingly, this Court has recognized that, whenever it is claimed that speech is unprotected, the First Amendment "imposes a special responsibility on judges" to "be sure that the speech in question actually falls within the unprotected category." *Bose*, 466 U.S. at 505. Hence, an appellate court must conduct an independent review of the record "to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited." *Id.* at 505.

The Court first applied the doctrine of independent review to a libel case in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1984). In *New York Times*, this Court held that, when actual malice is at issue, an appellate court must conduct an independent review of the evidence in order to ensure that there has been no "forbidden intrusion on the field of free expression." *Id.* at 285. The Court reiterated this principle in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), in *Bose, supra*, and in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989).

2. This Court Has Held that Public Interest Speech Falls Within the Unprotected Category of Actionable Libel Only if it is False.

In *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986), this Court held that "the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern." *Id.* at 777. Just as *New York Times* made proof of actual malice

a constitutional requirement in public official plaintiff cases, so *Hepps* made proof of falsity a constitutional requirement in public interest cases:

> Here, as in *Gertz [v. Robert Welch, Inc.*, 418 U.S. 323 (1974)], the plaintiff is a private figure and the newspaper articles are of public concern. In *Gertz*, as in *New York Times*, the common-law rule was superseded by a constitutional rule. We believe that the common law's rule on falsity — that the defendant must bear the burden of proving truth — must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages.

Id. at 775-776. The Court imposed this constitutional requirement "[t]o ensure that true speech on matters of public concern is not deterred . . ." *Id.* at 776.[11]

3. The Supreme Court of Michigan Properly Interpreted the Independent Review Doctrine as Applying to Determinations That Public Interest Speech Has Been Proved False.

The Supreme Court of Michigan combined the independent review doctrine of *New York Times* (and its progeny) with the

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11. Petitioners seem to suggest that the *Hepps* falsity requirement does not apply to "libel by implication" cases. (*See* Pet. 19) In support of this suggestion, petitioners cite this Court's opinion in *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695 (1990). The suggestion that the falsity requirement applies any less to implications than it does to statements is logically indefensible. Moreover, this argument rests on a patent misreading of *Milkovich*, which addressed actionable and non-actionable opinions rather than the type of "libel by true facts" theory that petitioners advance here.

plain meaning of *Hepps*, and concluded that "an independent appellate review of the burden of proof with regard to falsity in private figure, public-interest cases deters 'forbidden intrusion on the field of free expression' as a logical corollary to independent review of actual malice." (Pet. App. A-26) The Supreme Court of Michigan properly reasoned that "[a] jury verdict against the great weight of the evidence regarding the falsity requirement, unreviewed by a court, would . . . comprise a forbidden intrusion on protected speech, in the same way as would a failure to review for clear and convincing evidence of actual malice." (Pet. App. A-26, A-27)[12]

4. Petitioners' Objections to the Reasoning of the Supreme Court of Michigan Are Without Merit.

Petitioners raise several objections to the lower court's reasoning. Petitioners initially contend that the doctrine of independent review has only been applied where this Court has fixed "a category of unprotected speech within substantive constitutional limitations," such as the categories of obscenity and fighting words. (*See* Pet. 16-17) This argument does not advance petitioners' position.

As noted above, in *Hepps*, this Court created a "constitutional requirement" that "a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant." *Hepps*, 475 U.S. at 776-777. Therefore, if such speech is indeed provably false, then it falls within an unprotected category. In cases where such constitutionally required categories exist, this Court "has regularly conducted an independent review of the

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12. It should be noted that, in so ruling, the Supreme Court of Michigan was careful to define the scope of independent review in narrow terms. *See* footnote 7, *supra*.

record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits." *Bose*, 466 U.S. at 505 (1983).

This is precisely how the Michigan Supreme Court defined its mission. The court below concluded that "the task of the reviewing appellate court in a libel case is . . . to independently examine the record as a whole to insure that the burden of proof with respect to falsity has been satisfied . . ." (Pet. App. A-26, n.17) Absent such an examination, it is impossible to discern how a reviewing court could ensure that the speech at issue falls within the unprotected category and "ensure that true speech on matters of public concern is not deterred . . . ." *Hepps*, 475 U.S. at 776-777 (1985).

Petitioners also cite *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419 (1991), a summary judgment case. *Masson* does not support petitioners' position concerning independent appellate review. Nothing in *Masson* indicates that an appellate court should refuse to review a plaintiff's ability to prove falsity. To the contrary, in *Masson* this Court reviewed the falsity issue and affirmed the summary dismissal of several of plaintiff's libel claims based on his failure to prove material falsity.

Petitioners further argue that "since publication by the media appears to create a presumption that the material is of public concern," the duty of independent appellate review "extends to *every* jury verdict in *every* libel action involving a media defendant." (Pet. 17) (emphasis in original). This argument is wholly unfounded. In *Hepps*, 475 U.S. at 776, this Court held that newspaper articles that stated the plaintiffs had links to organized crime were "of public concern." The articles at issue in this case are similarly "of public concern." Neither this Court, nor the Supreme Court of Michigan, have endorsed a principle

that would lead to the ominous results forecast by petitioners.

Finally, petitioners argue that independent appellate review is not necessary because "[w]here a properly instructed jury . . . has found the defendant's statements to be false, any constitutionally inspired solicitude for the defendant's speech should vanish . . ." (Pet. 18) This argument suggests that the function of an appellate court is simply to examine the jury instructions and, if they suffice, rubber-stamp the verdict. Such a "review" would scarcely be a review at all, would certainly fail to afford the type of protection to free speech that is envisioned by *Hepps*, and is utterly inconsistent with the language and spirit of *Bose*.[13] This spirit is exemplified in this Court's rejection of attempts to insulate jury verdicts in obscenity cases from appellate review:

> Similarly, although under *Miller v. California*, 413 U.S. 15 (1973), the questions of what appeals to "prurient interest" and what is "patently offensive" under the community standard obscenity test are "essentially questions of fact," *id.*, at 30, we expressly recognized the "ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary," *Id.* at 25. We have therefore rejected the contention that a jury finding of obscenity *vel non* is insulated from review so long as the jury was properly instructed and there is some evidence

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13. Petitioners argue that certiorari should be granted to resolve a conflict in the lower courts. In support of this position, they cite *Maheu v. Hughes Tool Co.*, 569 F.2d 459, 464 (9th Cir. 1977). This case cannot create a conflict with the Michigan Supreme Court's interpretation of *Hepps*, since *Maheu* predates *Hepps* by nine years. The other cases cited by petitioners (*see* Pet. 26) do not address the constitutional falsity element but, rather, address common law elements of a defamation claim, such as negligence and damages.

> to support its findings, holding that substantive constitutional limitations govern.

Bose, supra, 466 U.S. at 506-507.

C. The Right to Trial by Jury Is Not Implicated in This Case.

For more than a century, this Court has recognized that the Seventh Amendent, requiring trials by jury, is not binding upon the states. *Walker v. Sauvinet,* 92 U.S. 90 (1875). Petitioners acknowledge as much. (Pet. 20) Petitioners nevertheless argue that this Court should abandon this well-settled principle.

This Court has repeatedly stressed that "the doctine of *stare decisis* is of fundamental importance to the rule of law." *Patterson v. McLean Credit Union,* 491 U.S. 164, 172 (1989). As a result, this Court has never departed from precedent without "special justification." *Arizona v. Rumsey,* 467 U.S. 203, 212 (1984).

Petitioners have not offered any such "special justification." Indeed, petitioners base their argument upon the assumption that juries are paricularly qualified to adjudicate matters involving free speech, an assumption that is itself belied by the decisions of this Court. *See, e.g., Bose,* 466 U.S. at 505:

> Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category of [unprotected speech], nor served to eliminate the danger that decisions by triers of fact may inhibit the protection of protected ideas.

See also, Lockhart and McClure, *Censorship of Obscenity, The Developing Constitutional Standards,* 45 Minn. L. Rev. 5 (1960):

> If freedom is to be preserved, neither government censorship experts nor juries can be left to make the final effective decisions restraining free exression. Their decisions must be subject to effective, independent review, and we know of no group better qualified for that review than the appellate judges of this country under the guidance of the Supreme Court.

Id. at 119 (cited and quoted in *Jacobellis v. Ohio,* 378 U.S. 184, 188 n.3 (1963) (plurality of opinion of Brennan, J.)).

The Michigan Supreme Court did not invade the province of the jury or deprive the jury of the opportunity to resolve some issue as to which it had special competence. To the contrary, the Supreme Court of Michigan served the precise function assigned to the courts: it fulfilled a constitutional responsibility to review the factual record and insure that protected speech has not been punished.

CONCLUSION

Petitioners, unwilling to allege and unable to prove that the articles at issue contained a single false statement of fact, retreated to their "libel by implication" theory. The Michigan Supreme Court did nothing more than review petitioners' own admissions and the published facts (which petitioners conceded they could not prove false). From this limited review, the Michigan Supreme Court reached the inescapable conclusion that petitioners completely failed to prove falsity of either fact or implication. Petitioners argue that this level of review was improper. To the contrary, it is clear from the decisions of this Court, and from Michigan's own "longstanding" policy of allowing "great latitude" to public interest speech,[14] that any lesser review would fail to ensure that such speech remains robust, wide-open, protected, and undeterred. For the foregoing reasons, the writ should not issue.

Respectfully submitted,

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14. *See* Justice Cavanaugh's concurring opinion, Pet. App. A-58.

APPENDIX A — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

STATE OF MICHIGAN
IN THE
SUPREME COURT

Supreme Court

No. 86351

On Appeal from the Court of Appeals First District

JOSEPH JUDEAS LOCRICCHIO and GARY FRANCELL,

Plaintiffs-Appellees,

-vs-

EVENING NEWS ASSOCIATION, MICHAEL WENDLAND and JEAN GADOMSKI,

Defendants-Appellants,

and

PETE WALDMEIR and BILL GILES,

Defendants.

Court of Appeals No. 98002
Wayne County Circuit Court
No. 80 12415 CZ

* * *

Appendix A

[44] JUSTICE ARCHER: What sentences or what was in that — what was said by or written by Mike Wendland, with specificity, was false if there is a statement or paragraph or whatever it is? What do you say in that — in the series of articles are false? I take your case to be false implication.

MR. KENNEY: Absolutely. There's no question about it.

JUSTICE ARCHER: And what I understand, as least what's been argued by defense, is at no time from either request for interrogatories, at no time at trial, at no time before the Court of Appeals, and in your briefs, had you ever said that a particular sentence, word, paragraph, or whatever the case may be, was actually false.

MR. KENNEY: That's — what we have [45] said is that there — that the literal words used is not what we're basing our complaint on; that it is the implication, the juxtaposition, and what have you, of the totality of the articles improperly implies by innuendo, or what have you, a false statement.

* * *